



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Castle Floor Covering

File: B-242718

Date: May 28, 1991

Robert E. Gibson for the protester.
Betty C. McMurtry, Farmers Home Administration, Department of Agriculture, for the agency.
Robert A. Spiegel, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Bid guarantee in the form of a cashier's check to the order of "Farmers Home Bureau, U.S. Government" on a construction services solicitation issued by the Farmers Home Administration is an acceptable firm commitment to the government since there is no doubt that the check can be negotiated by the agency in the event of a default by the bidder.

DECISION

Castle Floor Covering protests the rejection of its bid as nonresponsive under invitation for bids (IFB) No. 09-00-1-009P, issued by the Department of Agriculture, Farmers Home Administration (FmHA), Gainesville, Florida, for the repair of five government-owned, single-family houses. Castle alleges that FmHA erroneously found its bid guarantee unacceptable.

We sustain the protest.

The IFB required bidders to furnish a bid guarantee in the amount of 20 percent of the bid price. The IFB also included the clause at Federal Acquisition Regulation (FAR) § 52.228-1, which requires that bidders "shall furnish a bid guarantee in the form of a firm commitment, such as a bid bond, postal money order, certified check, cashier's check, irrevocable letter of credit, or . . . certain bonds or notes of the United States." That clause further advised that "failure to furnish a bid guarantee in the proper form and amount, by the time set for opening of bids, may be cause for rejection of the bid."

Three bids were received by the January 3, 1991, bid opening. The low bidder was found nonresponsive because it did not submit a bid guarantee with its bid. Castle submitted the second low bid in the amount of \$35,725 with a bid guarantee in the form of a cashier's check from First Union National Bank of Florida in the amount of \$7,150. The cashier's check stated that it was to be paid to the order of "Farmers Home Bureau U.S. Government." There was no reference to the solicitation number or project on the face of the check. The agency contends that the check cannot be negotiated by FmHA since it was not made out to that agency, and the bank may not honor the check. Since FmHA found that Castle's bid guarantee did not represent a firm commitment to the government, it rejected Castle's bid as nonresponsive. The agency found the third bid on the IFB unreasonably high in price and canceled the IFB for the five houses.

Proposals were then orally requested for the three houses most urgently in need of repair, and award made to another offeror; Castle submitted the second low quote on that solicitation. For the remaining two houses, FmHA has issued a request for quotations (RFQ) and received quotes on January 16, 1991. Castle did not submit a response to the RFQ, although it protested this solicitation to the agency. No award has been made under the RFQ pending our decision on Castle's protest of the rejection of its bid.

Castle timely protested the rejection of its bid under the IFB to our Office contending that the cashier's check submitted as its bid guarantee was negotiable by FmHA and represented the required firm commitment. We agree.

The submission of a binding bid guarantee is a material condition of responsiveness with which a bid must comply at the time of bid opening. Blakelee Inc., B-239794, July 23, 1990, 90-2 CPD ¶ 65. The determinative question in judging the sufficiency of any bid guarantee is whether it clearly could be enforced if the bidder subsequently defaults by failing to execute the required contract documents and providing acceptable performance and payment bonds. Daniel R. Hinkle, B-220163, Dec. 9, 1985, 85-2 CPD ¶ 639.

The IFB expressly authorized cashier's checks as acceptable bid guarantees. In determining the enforceability of checks, including cashier's checks, by the government, we think that the Uniform Commercial Code (UCC) should be controlling to the maximum extent practicable where not inconsistent with federal interest, law, or court decisions. See 62 Comp. Gen. 121, 122 (1983); 51 Comp. Gen. 668, 670 (1970); cf. The GR Group, Inc., B-242570, Apr. 29, 1991, 91-1 CPD ¶ 418 (countervailing federal law governing the pledging of a U.S. Treasury Bill as

a bid guarantee so that UCC provisions governing the pledging of assets were not applicable).

A cashier's check is a check drawn by a bank upon itself. Under the UCC, a cashier's check is considered accepted by the bank upon issuance, and is thus not subject to stop payment. See UCC § 3-410(1); Dziurak v. Chase Manhattan Bank, N.A., 396 N.Y.S.2d 414 (1977), aff'd, 406 N.Y.S.2d 30, 377 N.E.2d 474 (1978); State ex rel. Chan Siew Lai v. Powell, 536 S.W.2d 14 (Mo. 1976). That is why cashier's checks are considered a sufficient firm commitment to be an acceptable bid guarantee.^{1/}

The agency primarily argues that the Castle cashier's check is defective because it is made out to the Farmers Home Bureau and thus is not negotiable by FmHA. UCC § 3-203 recognizes that commercial instruments can be negotiable even where made payable to a person under a misspelled name. Minor errors in the name of a payee of a check will not affect the negotiability of the instrument so long as the payee is identified with reasonable certainty. Hartford Acc. & Indem. Co. v. American Express Co., 544 N.Y.S.2d 573, 542 N.E.2d 1090 (1989); Quantum Supplies Inc. v. Bank of the South, 544 So. 2d 1 (La. 1989), writ denied, 550 So. 2d 653 (La. 1989). "To require a bank to return or refuse to accept all documents not tendered at time of presentment exactly as shown on the face [of the check] would create chaos." Quantum Supplies, Inc. v. Bank of the South, 544 So. 2d, at 4.

In this case, the check made payable to the order of the "Farmers Home Bureau U.S. Government" only could be a reference to the FmHA; no other federal agency has a similar name. If the check had been made payable to the United States or U.S. government alone, there is no question but that the check would have been negotiable by FmHA. In the absence of any possibility that the check could be negotiated by another entity, we perceive no reasonable circumstances where the bank would not be required to honor this cashier's check.^{2/} Thus, Castle's bid guarantee should have been accepted.

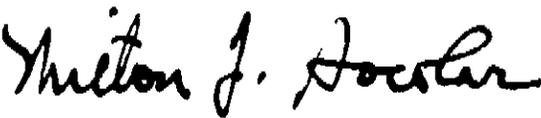
^{1/} This form of bid security offers many advantages over bid bonds, which are the most commonly submitted form of bid guarantee. This is so because the government has immediate access to the funds without any defenses sureties might raise. See N.G. Simonowich, 70 C mp. Gen. ____, B-240156, Oct. 16, 1990, 90-2 CPD ¶ 298.

^{2/} The bank has confirmed that the check can be negotiated by FmHA.

The agency also argues that the cashier's check was defective because it did not reference the solicitation number. We disagree. FmHA cites FAR § 28.101-4(c)(9), which provides that a defect in a bid bond not listing the United States as the obligee can be accepted so long as it correctly identifies the bidder, the solicitation number and the name and location of the project involved. By its terms, the provision only applies to bid bonds, not cashier's checks, see FAR § 28.001 (which defines a bond), and only applies where the bid guarantee is deficient, which is not the case here. Also, a cashier's check submitted as a bid guarantee is not required to reference the IFB number or project to be enforceable.^{3/} UCC § 3-112(1)(a) provides that the negotiability of an instrument is not affected by the omission of a statement of any consideration (in this case the IFB or project). See Northwestern National Bank of Minneapolis v. Shuster, 307 N.W. 2d 767 (Mn. 1981).

The protest is sustained.

Since the repair work on three of the houses covered by this IFB has been or will soon be completed, we cannot recommend any remedial action for that portion of the IFB requirement. With regard to the remaining two houses, FmHA should make award to Castle as the low responsive bidder, if otherwise appropriate, and cancel the RFQ. Under the circumstances, Castle is entitled to its bid preparation costs on the IFB and its costs of pursuing the protest. 4 C.F.R. § 21.6(d) (1991). The protester should submit its claim for these costs directly to the agency.

for 
Comptroller General
of the United States

^{3/} As discussed above, there is a fundamental difference between a cashier's check and a bid bond in that third party instruments are strictly construed in favor of the surety. A.D. Roe, Inc., 54 Comp. Gen. 271 (1974), 74-2 CPD ¶ 194. If a bid bond did not specifically identify the project or solicitation, those instruments would be considered unacceptable since they would not clearly bind the surety or issuer to the government in the event of a default by the bidder. See Grafton McClintock, Inc., B-241581.2, Apr. 17, 1991, 91-1 CPD ¶ ____.