



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

Decision

Matter of: D.O.N. Protective Services, Inc.
File: B-244386.2; B-245354
Date: January 6, 1992

Don L. Frierson for the protester.
Howard L. Hardegree, Esq., General Services Administration,
for the agency.
Scott H. Riback, Esq., and John M. Melody, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

The requirement in an irrevocable letter of credit (ILC) that the agency submit to the issuer a written statement that the bidder is in default under the terms and conditions of Federal Acquisition Regulation (FAR) part 28, as a pre-condition to payment under the ILC, does not limit the issuer's liability; consequently, firm's bids were improperly determined to be nonresponsive for failing to provide unconditional ILCs.

DECISION

D.O.N. Protective Services, Inc. protests the rejection of its bids as nonresponsive under invitation for bids (IFB) Nos. GS-07-P-91-DRB-0023 (0023) and GS-07-P-91-DRB-0039 (0039), issued on a total small business set-aside basis by the General Services Administration (GSA) to acquire security guard services at various locations. D.O.N. argues that GSA improperly determined that its bids were nonresponsive for failing to provide adequate bid guarantees under the solicitations.

We sustain the protests.

The IFBs called for the submission of fixed monthly prices for the provision of security guard services; IFB 0023 covers five federal buildings in New Orleans and IFB 0039 covers the Department of Defense national stockpile depot in Baton Rouge. Both solicitations contemplated contract performance for a base year and two 1-year option periods. Both solicitations also required the submission of a bid guarantee in an amount equal to 20 percent of the base bid, and provided that an irrevocable letter of credit (ILC) would be acceptable. Under IFB 0023, the agency received

10 bids, 4 of which, including the low bid and D.O.N.'s second-low bid, were determined to be nonresponsive. Under IFB 0039, four of the seven bids, including the low bid, second-low bid, and D.O.N.'s third-low bid, were determined to be nonresponsive. The agency awarded contracts under both solicitations to Bayou State Security Services, Inc.

D.O.N.'s bids were rejected based on inadequate bid guarantees. For each solicitation, D.O.N. submitted an ILC in satisfaction of the bid guarantee requirement, both identical in form and containing the following legend:

"Drafts must be accompanied by: (1) the original letter of credit; and (2) your signed statement that D.O.N. Protective Services, Inc. is in default under the terms and conditions of FAR part 28."

The agency determined that the requirement for a written statement that the protester was in default under the terms and conditions of Federal Acquisition Regulation (FAR) part 28 constituted an impermissible qualification of the guarantees that rendered D.O.N.'s bids nonresponsive. Specifically, GSA determined that since D.O.N. technically cannot be found in default under FAR part 28, which covers bid guarantees and other bonding requirements but not defaults (FAR part 49), the ILCs established a payment condition that could not be met.

A letter of credit is essentially a third-party beneficiary contract whereby a party desiring to transact business induces another, usually a bank, to issue a letter to a third party, promising to honor that party's drafts or other demands for payment. Bailey Enters., 66 Comp. Gen. 324 (1987), 87-1 CPD ¶ 265. Where an offered letter of credit accompanying a bid in satisfaction of a bid guarantee requirement contains language which renders it uncertain whether the government could enforce the instrument against the issuer, the bid must be rejected as nonresponsive. Thus, for example, if a letter of credit conditioned the obligation of the issuer upon the performance by the government of actions which would limit the government's rights, the bid must be rejected as nonresponsive. Waste Conversion, Inc., B-231524, Aug. 16, 1988, 88-2 CPD ¶ 151.

GSA correctly found that the ILCs here condition payment by the issuer on specific actions by the government: production of the ILC and a written statement that D.O.N. is in default under FAR part 28. We do not agree with GSA, however, that the latter condition is impermissible or limits the government's rights. While FAR part 28 does not address the regulatory requirements for a default termination, we see no legal impediment to the agency's

stating that D.O.N. is in default under the terms and conditions of FAR part 28 should it become necessary. FAR part 28 specifically describes the nature and purpose of a bid guarantee as well as the potential loss from which a bid guarantee is designed to protect the government. In particular, FAR § 28.001 defines a bid guarantee as a form of security assuring that a bidder will not withdraw a bid and will execute a written contract and furnish the required bonds within the time specified in the bid. If a bidder failed to carry out these actions, we see no reason why it properly could not be represented to the surety that the bidder has defaulted on its obligation as defined in FAR § 28.001, that is, FAR part 28. We conclude that there is no question regarding the enforceability of the ILCs tendered by D.O.N. with its bids and that the agency erred in rejecting D.O.N.'s bids as nonresponsive.¹

By separate letter of today to the Administrator, we are recommending that the contracts awarded under the subject solicitations be terminated for the convenience of the government and that contracts under both solicitations be awarded to D.O.N. if otherwise proper. We also find D.O.N. entitled to the costs of filing and pursuing its bid protests, including attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1991).

The protests are sustained.

for 
Comptroller General
of the United States

¹Further, even if the agency declared D.O.N. in default under another section of the FAR, a minor deviation between the documents specified in the ILC and those presented does not relieve the issuer of liability where the deviation does not mislead the issuer either as to the identity of the beneficiary or the purpose for which payment is being sought. In our view, the reference in the ILCs to FAR part 28 in no way relieves the surety of its obligation to the government in the event of a default covered by the guarantee. General Elec. Co.; Westinghouse Elec. Corp., 67 Comp. Gen. 179 (1988), 88-1 CPD ¶ 6.