

**DECISION**



*L. Fitzmaurice*  
**THE COMPTROLLER GENERAL  
OF THE UNITED STATES** *Pl. I*

WASHINGTON, D.C. 20548

*876<sup>3</sup>*

FILE: B-192893

DATE: December 27, 1978

MATTER OF: Chemical Technology, Inc.

DIGEST:

*[Bid is Considered Nonresponsive When Bid Guarantee is Defective]*

1. Protester's bid is properly rejected as nonresponsive where "Irrevocable Letter of Credit" submitted to comply with IFB's bid guarantee requirement is defective because letter was issued by protester rather than other independent credit source.
2. Bidder acting as personal surety when required to provide bid guarantee has not met requirement. Bonding company's post bid opening offer to stand behind bidder's personal guarantee is not for consideration, and public interest in strict maintenance of competitive bidding process outweighs any monetary savings Government might realize by waiving deficiencies in protester's bid guarantee.
3. Failure to inspect contract site prior to opening which IFB puts in nonmandatory terms does not render bid nonresponsive.
4. Low responsive bidder may voluntarily decrease bid price after bid opening.
5. Contracting officer determination of price reasonableness was not abuse of discretion where low, responsive bidder's price was considered fair and reasonable even prior to voluntary price reduction.

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*DEC*

Chemical Technology, Inc. (CTI), has protested the rejection of its bid as nonresponsive under invitation for bids (IFB) No. DOT-CG07-8098, issued by the United States Coast Guard (CG).

The solicitation was for security protection and patrol services for the United States Coast Guard Areas, San Juan, Puerto Rico. Bids were received from CTI and the National Investigation Bureau, Inc. (NIB). When these were opened, CTI was the low bidder. However, the CTI bid was declared nonresponsive because the "Irrevocable Letter of Credit" accompanying the bid in attempted satisfaction of the bid guarantee provisions of the IFB was determined to be insufficient and legally defective. The NIB bid was found to be responsive to the IFB.

CTI challenges the rejection, arguing that its letter of credit does satisfy the IFB requirement for a bid guarantee. CTI also points out that its bonding company, American Druggist Insurance Company, notified the contracting officer shortly after bid opening that it would stand behind CTI's bid guarantee. Moreover, CTI contends that by accepting its bid rather than NIB's, the Government will obtain a monetary advantage since the price initially offered by NIB is unreasonable.

CTI further maintains that the contracting officer only found its bid nonresponsive because it offered a letter of credit which was not in the specific form which the agency wants whenever a letter of credit is used as a bid guarantee. Based on this assumption, CTI argues that if the contracting officer wanted letters of credit in a precise form then that form should have been included in the solicitation package. Thus, CTI concludes that its letter of credit does provide the "firm commitment" called for by the IFB and, therefore, its bid is responsive to the IFB.

In addition to the above arguments, CTI maintains that NIB's bid is nonresponsive since NIB has failed to comply with the IFB requirement to inspect the contract site prior to bid opening. Further, CTI

questions the propriety of NIB being permitted to lower its bid price after bid opening since, in CTI's opinion, this allows NIB to negotiate a price on a sole-source basis under what was initially an advertised procurement.

Based on the foregoing, CTI asks our Office to direct the contracting officer to either award CTI the contract as the low responsive and responsible bidder or direct her to cancel the solicitation and then negotiate a contract with CTI on the basis that the only other bid is unreasonable and provides a basis to cancel the IFB.

The bid guarantee requirement of the solicitation provides in pertinent part:

- "(a) Bids in excess of \$2,000 shall be accompanied by a bid guarantee of not less than twenty percent (20%) of the amount bid for all services (including all optional items, if any) for the term of the contract through 30 September 1979.
- "(b) Failure to furnish a required bid guarantee in the proper form and amount, by the time set for opening of bids, may be cause for rejection of the bid.
- "(c) A bid guarantee shall be in the form of a firm commitment, such as a bid bond (Standard Form 24), postal money order, certified check, cashier's check, irrevocable letter of credit made payable to the United States Coast Guard or in accordance with Treasury Department regulations, certain bonds or notes of the United States.  
\* \* \*"

We have consistently held that the bid bond requirement is a material part of the invitation and that the contracting officer cannot generally waive the failure to comply but must reject as nonresponsive a bid not accompanied by the required bond. See 38 Comp. Gen. 532 (1959); 46 Comp. Gen. 11 (1966); Newport Ship Yard, Inc., B-191703, May 25, 1978, 78-1 CPD 400. The rationale for this rule is that waiver of the bid guarantee requirement would have the tendency to compromise the integrity of the competitive bid system since it would (1) make it possible for a bidder to decide after bid opening whether or not to have his bid rejected, (2) cause undue delay in effecting procurements, and (3) create inconsistencies in the treatment of bidders due to the subjective determinations contracting officers would have to make as a matter of necessity. See 38 Comp. Gen., supra, at 536. Although some exceptions to this general rule are authorized by Federal Procurement Regulations (FPR) § 1-10.103-4 (1964 ed. amend. 184), these provisions are not applicable in this instance.

Initially, we note that CTI has misconstrued the basis for the contracting officer's determination. There is no question that an irrevocable letter of credit complies with the IFB's bid guarantee requirement. Nor is any special form required by either the IFB or procurement regulations. However, before any instrument can be accepted as a letter of credit, it must meet certain general requirements. Here, the instrument which CTI offered as a letter of credit was not rejected because it was submitted in one form rather than another, but because the contracting officer concluded that it was not a valid letter of credit. We agree.

In Juanita H. Burns and George M. Soble, 55 Comp. Gen. 587 (1975), 75-2 CPD 400, we discussed the sufficiency of a commercial letter of credit offered as a bid guarantee. We stated that a letter of credit

is essentially a third-party beneficiary contract by which a customer of a financial institution wishing to transact business induces another person, bank, or other 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.

CTI's "Irrevocable Letter of Credit," which is signed by the president of the firm who also signed the bid, states that, by corporate resolution, CTI is "firmly bound to the United States of America in the penal sum of Fifty Three Thousand, Eight Hundred Four Dollars and Fifteen Cents (\$53,804.15)" which is to constitute the bid guarantee for the subject solicitation. Clearly, the document in question is not a valid letter of credit as discussed above. The purpose the CTI document serves is to bind only CTI to make payment if later required to do so. Thus, CTI is merely promising to act as its own surety rather than obtaining a promise of payment from an independent source of credit such as a bank or other financial institution.

The IFB expressly states that the bid guarantee will be in the form of a "firm commitment." See, also, FPR § 1-10.102-2 (1964 ed. amend. 184). In other cases, where bidders have tendered personal checks as bid guarantees, in essence offering to act as personal sureties, we have held that such checks are not the firm commitments required because such instruments are subject to events such as insufficient funds or stop-payment orders. See Southern Space, Inc., B-179962, March 29, 1974, 74-1 CPD 155; Sealtite Corporation, B-186261, June 11, 1976, 76-1 CPD 369; Edward D. Griffith, B-188978, August 29, 1977, 77-2 CPD 155. The various types of bid guarantees set forth in the IFB, as provided for in the procurement regulations, are not under the bidder's control, subject to any financial problems that the bidder might encounter,

and represent commitments on the part of parties other than the bidder which give additional protection to the Government in the event of failure of the bidder to carry out the obligations for which the guarantee provides protection. Based on the above, we find that CTI has not offered a bid guarantee which is the "firm commitment" required by acting as its own surety. Therefore, the contracting officer was correct in finding the bid guarantee to be defective and a basis to reject the CTI bid.

As mentioned above, such a deficiency renders a bid nonresponsive. 38 Comp. Gen., supra. The fact that, after bid opening, CTI's bonding company offered to stand behind CTI's bid guarantee does not correct this deficiency since bid guarantees must be established with the bid. A. D. Roe Company, Inc., 54 Comp. Gen. 271 (1974), 74-2 CPD 194. In addition, we have also stated that the public interest in the strict maintenance of the competitive bidding process far outweighs any monetary savings that the Government might realize by waiving a protester's bid bond deficiencies. Cassidy Cleaning, Inc., B-191279, April 27, 1978, 78-1 CPD 331; Newport Ship Yard, Inc., supra. Therefore, despite CTI's claim that the Government can obtain a monetary advantage by awarding CTI the contract rather than NIB, the contracting officer acted properly in rejecting CTI's bid as nonresponsive due to the defective bid guarantee.


As to CTI's argument that the failure to inspect the contract site prior to bid opening rendered NIB's bid nonresponsive, we agree with the contracting officer that the solicitation provides that bidders "should" visit the site, but does not make such a visit mandatory. We also concur, therefore, that NIB's failure to visit the site does not render its bid nonresponsive. See, 52 Comp. Gen. 955 (1973); Southern Industrial Laundry d/b/a Alabama Laundries and Linen Supply, B-191095, April 21, 1978, 78-1 CPD 310.

In regard to CTI's concern over NIB being allowed to lower its bid price after bid opening resulting in a sole-source negotiation, we note that it is well established that a low responsive bidder may voluntarily decrease the amount of its bid since there is no prejudice to the other bidders and the Government receives a benefit. See, e.g., Leitman v. United States, 60 F. Supp. 218 (Ct. Cl. 1945); 38 Comp. Gen. 674 (1959); 40 Comp. Gen. 466 (1961); Park Construction Company, B-190191, July 18, 1978, 78-2 CPD 42.

Insofar as the unreasonableness of NIB's price is concerned, the contracting officer has concluded, even prior to NIB's offer to voluntarily lower its bid, that NIB's net bid price was fair and reasonable when compared with the Government estimate and the current per hour cost under the existing contract. We have held that the determination of price reasonableness is a matter within the discretion of the contracting officer and that our Office will not interfere, as here, where there is an absence of a showing of a clear abuse of discretion. Bonneville Power Administration, B-188473, August 3, 1977, 77-2 CPD 74; Reliable Elevator Corp., B-191061, April 27, 1978, 78-1 CPD 330. Therefore, the contracting officer had the authority to accept both NIB's initial bid price and the lower price offered voluntarily after bid opening.

In view of the above, CTI has not presented any basis for the cancellation of the solicitation and negotiation with CTI alone.

Accordingly, the protest is denied.

  
Acting Comptroller General  
of the United States