

**DECISION****THE COMPTROLLER GENERAL  
OF THE UNITED STATES  
WASHINGTON, D. C. 20548**

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FILE: B-184331

DATE: December 18, 1975

MATTER OF: Juanita H. Burns and George M. Sobley

**DIGEST:**

Documentary letter of credit furnished as bid guarantee does not constitute "firm commitment" as required by solicitation and ASPR 7-2003.25 (1974 ed.), thereby rendering bid nonresponsive, since letter of credit was not accompanied by bidder's signed withdrawal application which would have to be presented to bank in order for letter of credit to be honored.

Juanita H. Burns and George M. Sobley (B & S), bidding as a joint venture, protest the rejection of their bid as nonresponsive under Invitation for Bids F22608-75-09014 issued for refuse collection and disposal services at Columbus Air Force Base, Mississippi.

The protester's bid was rejected on the basis of two alleged deficiencies in the letter of credit furnished as the 20 percent bid guarantee required under solicitation paragraphs 21, 22 and 23. In particular, the contracting officer determined that the protester's letter of credit failed to identify both the bidder and the solicitation as required by paragraph 23 which provides that:

"If the Bid Guarantee is in the form of an irrevocable letter of credit, the letter of credit must (i) be issued by a bona fide financial institution, (ii) identify the bidder and the solicitation, and (iii) be a firm guarantee in an amount equal to 20 percent of the bid price." (Emphasis added)

Accordingly, the contracting officer rejected the B & S bid pursuant to paragraph 21 which states in pertinent part that:

"Where a bid guarantee is required by the Invitation for Bids, failure to furnish a bid guarantee in the proper form and amount, by time set for opening of bids, may be cause for rejection of the bid. \* \* \*"

Upon additional review of the protester's bid, the Air Force has determined that the letter of credit which expired on August 12, 1975, was not coextensive with the 60 day period expiring on August 16, 1975, during which bids were to remain open. Most importantly, the Air Force also maintains that the bid guarantee did not constitute a "firm commitment" as required by Armed Services Procurement Regulation (ASPR) § 7-2003.25 (1974 ed.). The letter of credit stated that any draft against the letter would have to be accompanied by an approved withdrawal application signed by Mr. Bob Burns or Mrs. Juanita Burns, the depositors whose account was to serve as collateral for the letter of credit. Since the requisite withdrawal application did not accompany the bid guarantee, the Air Force contends that the letter of credit is defective and renders the bid nonresponsive.

Protester's counsel argues that although the letter of credit does not identify the solicitation number, or Juanita H. Burns and George M. Sobley as the bidders, the letter is not deficient since the bid to which it was attached, clearly supplied the missing information. Regarding the other bases for objection raised by the Air Force, counsel maintains that they may not properly be considered since the contracting officer initially rejected the bid solely because of the letter's failure to identify the bidders and the solicitation number and not because the letter of credit was not a firm guarantee. However, we believe that once the propriety of a procurement action has been questioned through the filing of a protest with our Office, we are obligated to consider all the relevant circumstances including those which may not have been considered initially by the contracting officer.

This Office has not previously considered a bid guarantee case involving the sufficiency of a commercial letter of credit. Article 5 of the Uniform Commercial Code (UCC) constitutes the basic law in this area. See also Miss. Code Ann. § § 75-5-101 et. seq. (1972). Ordinarily, at the request of one of its customers, a bank or other financial institution issues directly to a third party a promise to pay a sum of money upon being furnished certain documents, thereby substituting the bank's credit for the buyer's credit, in favor of the beneficiary. Therefore, a commercial letter of credit is essentially a third party beneficiary contract by which a party wishing to transact business induces a bank to issue the letter to a third party.

Section 5-102 of the UCC defines the scope of Article 5 and states, in part, that it applies "to a credit issued by a bank if the credit requires a documentary draft or a documentary demand for payment." UCC § 5-102 (1) (a). Section 5-103 (1) (a) defines a letter of credit as "an engagement by a bank or other person made at the request of a customer and of a kind within the scope of this Article (Section 5-102) that the issuer will honor drafts or other demands for payment upon compliance with the conditions specified in the credit. \* \* \*" A condition of honoring a documentary letter of credit is that the requisite enumerated documents be presented to the issuing bank, and courts have held that the requirements of a letter must be strictly complied with and that all required documents must be as stated in the letter. See Courtaulds North America, Inc. v. North Carolina Bank, 387 F. Supp. 92, 99-100 (M.D. N.C. 1975), citing Fidelity Bank v. Lutheran Mutual Life Insurance Co., 465 F.2d 211 (10th Cir. 1972); Sisalcorcs Do Brazil, Ltd. v. Fiacao Brasileira De Sisal, S.A., 450 F.2d 419 (5th Cir. 1971); Venizelos S.A. v. Chase Manhattan Bank, 425 F.2d 461 (2d Cir. 1970); Banco Espanol de Credito v. State Street Bank & T. Co., 385 F.2d 230, 234 n.5 (1st Cir. 1967).

In order for a bid to be considered responsive to an IFB, it must comply with all of the IFB's material requirements. 52 Comp. Gen. 265 (1972). It is a fundamental principle of procurement law that whether a bid is responsive to the IFB is for determination upon the basis of the bid as submitted and that it is not proper to consider the reasons for the nonresponsiveness, whether due to mistake or otherwise. 38 Comp. Gen. 819 (1959); 51 Comp. Gen. 836 (1972). It is also well-settled that defects which make a bid nonresponsive may not be waived by the contracting officer. 30 Comp. Gen. 179 (1950); 50 Comp. Gen. 733 (1971).

Beginning with our decision in 38 Comp. Gen. 532 (1959), we have consistently held that the bid bond requirements must be considered a material part of the IFB and the contracting officer cannot waive the failure to comply with these requirements. See e.g. 39 Comp. Gen. 60 (1959); 44 Comp. Gen. 495 (1965); 50 Comp. Gen. 530 (1971); 52 Comp. Gen. 223 (1972). We summarized the basis for this rule at page 536 of 38 Comp. Gen. supra, as follows:

"\* \* \*waiver of a bid bond requirement stated in an invitation for bids would have a tendency to compromise the integrity of the competitive bid system by (1) making it possible for a bidder to decide after opening whether or not to try to have his bid rejected, (2) causing undue delay in effecting procurements, and (3) creating, by the necessary subjective determinations by different

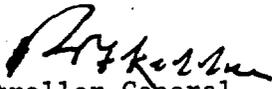
contracting officers, inconsistencies in the treatment of bidders. The net effect of the foregoing would be detrimental to fully responsive and responsible bidders, and could tend to drive them out of competition in those areas where the practices described occur. This result could hardly be said to serve the best interests of the United States.\* \* \*"

Furthermore, ASPR § 10-102.5 (1974 ed.) recognizes the materiality of the bid bond requirements. This regulation states in pertinent part:

"When a solicitation requires that bids be supported by a bid guarantee, noncompliance with such requirement will require rejection of the bid\* \* \*"  
(Emphasis added.)

Here, B & S asked the Bankers Trust Savings and Loan Association to issue a \$25,000 letter of credit in favor of the procurement officer at Columbus Air Force Base. As previously indicated, the letter stated that drafts would have to be accompanied by an approved withdrawal application signed by Mr. Bob Burns or Mrs. Juanita H. Burns. The determination of the sufficiency of a bid guarantee relates to whether the Government will receive the full and complete protection it contemplated in the event the bidder fails to execute the required contract documents and deliver the required performance and payment bonds. We believe that since the requisite withdrawal application was a material part of the bid guarantee and since it did not accompany the letter of credit, the letter did not constitute, at bid opening, a "firm commitment" as required by solicitation paragraph 23 and ASPR § 7-2003.25 (1974 ed.). Accordingly, if the bid had been accepted, but B & S then failed to undertake its contractual obligations, absent the withdrawal application, the Government would not have been able to receive the protection for which the bid guarantee requirements are designed.

In view thereof, we need not address the other bases for rejection of the B & S bid. Accordingly, the protest is denied.

  
Deputy Comptroller General  
of the United States