

DECISION**THE COMPTROLLER GENERAL
OF THE UNITED STATES**

WASHINGTON, D.C. 20548

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FILE: B-209182**DATE:** January 26, 1983**MATTER OF:** American Photographic Industries, Inc.**DIGEST:**

Rejection of a bid as nonresponsive is proper where letter of credit submitted with the bid as a bid guarantee is ambiguous because it refers not to the bidding corporation but only to the individual signing the bid.

American Photographic Industries, Inc. protests the rejection of its bid under invitation for bids F05600-82-B-0021 issued by the Air Force to procure the services needed to manage and operate the Audiovisual Service Center at Lowry Air Force Base. The Air Force rejected the bid as nonresponsive for failing to provide an adequate bid guarantee. We find that the agency's action was proper.

Photographic's bid of \$1,704,799.63 was the low bid received at the August 5, 1982 bid opening. The next low bid was \$2,170,768. A letter dated July 20 from the United American Bank, Chattanooga, Tennessee, was attached to Photographic's bid. This letter, which was addressed to Lowry Air Force Base and denominated an "Irrevocable Letter of Credit," stated in part:

"We [the bank] authorize you [Lowry AFB] to draw on us for the account of Stan Baker up to an aggregate amount of \$125,000 * * * accompanied by the following:

* * * * *

Your acceptance of this Credit will constitute your agreement to repay to us any funds paid by us to you hereunder and not used by you in satisfaction or reimbursement of any loss, cost, claim or expense incurred by you within the terms of the contract between yourselves and Stan Baker."

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The letter did not refer to the subject invitation. The protester's bid named Photographic as the bidder and was signed by Stan Baker as president of the corporation.

Photographic's bid was rejected as nonresponsive because the contracting officer concluded that the letter of credit did not constitute a firm commitment to guarantee Photographic's bid. The contracting officer's conclusion was based on the fact that the guarantee failed to refer to the solicitation number and did not identify Photographic as the principal; instead, it referred to Stan Baker, Photographic's president.

The protester argues that its bid guarantee was adequate and its bid responsive because (1) the bank cannot revoke the letter of credit, and thus its promise contained in its letter is enforceable by the Government; (2) the alleged defects in the letter of credit submitted with the bid constituted minor informalities that could be waived; and (3) the Government should not reject a saving of \$465,000--the difference between its bid and the next low bid. Further, the protester notes by letter of September 15, the bank corrected the defects in the original letter of credit by indicating that it was intended to be issued to Photographic.

A bid guarantee is a firm commitment that assures that a successful bidder will execute such contractual documents and provide such payment and performance bonds as may be required. Defense Acquisition Regulation (DAR) § 10-101.4. When a bid guarantee is required as part of a bid, the failure to provide a proper guarantee will render the bid nonresponsive. Zemark International Construction Co., B-203020, May 12, 1982, 82-1 CPD 372. This failure cannot be corrected, waived or excused unless one of the exceptions in DAR § 10-102.5 applies. None applies here. Waiver of the requirement is limited because such waivers 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 its 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. See Juanita H. Burns and George M. Sobley, B-184331, December 31, 1975, 75-2 CPD 400.

A bid guarantee may take the form of an irrevocable letter of credit. Alan L. Crouch, B-207652, October 19, 1982, 82-2 CPD 345. A letter of credit is essentially a third party beneficiary contract where a party desiring to transact business induces another, usually a bank, to issue a letter to a third promising to honor that party's drafts or other demands for payment upon the third party's compliance with certain conditions. Juanita H. Burns and George M. Sobley, *supra*. The effect of this arrangement is to substitute the bank's credit for that of the party at whose request the letter is issued. Chemical Technology, Inc., B-192893, December 27, 1978, 78-2 CPD 438. An irrevocable letter of credit satisfies the requirement of a firm commitment because it assures the Government of access to funds should a successful bidder fail or refuse to execute required contractual documents or to provide payment or performance bonds.

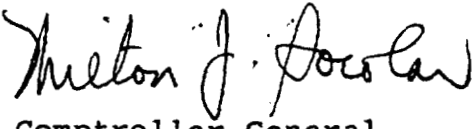
Here, we find that the Air Force reasonably concluded that the letter submitted with the protester's bid did not constitute an adequate guarantee. The letter of credit was at best ambiguous. It purported to draw upon the account of an individual who was not the named bidder and did not refer at all to the subject solicitation. Further, and even more significant, the letter stated that the Government could be required to repay funds paid to it pursuant to the letter if such funds were not used in satisfaction of expenses incurred within the terms of "the contract" between the Government and that individual. There, of course, could be no such contract since the individual is a separate legal entity from the corporation which submitted the bid under the subject invitation. See A.D. Roe Company, Inc., 54 Comp. Gen. 271 (1974), 74-2 CPD 194. It is simply unclear as to what liability the Government would incur as a result of this clause if Photographic failed to execute the contract and the Government were required to invoke this letter of credit. Thus, we have no basis upon which to object to the agency's rejection of the protester's bid.

The bank's second letter submitted after bid opening attempting to clarify its original letter cannot be considered because only material available at bid opening may be considered in making a determination of responsiveness. Fisher-Klosterman, Inc., B-185106, March 9, 1976, 76-1 CPD 165. Further, while it would be cheaper, as the protester argues, to accept its bid, the public interest in the

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strict maintenance of the competitive bidding process far outweighs any monetary savings that the Government might realize by waiving the deficiencies here. Chemical Technology, Inc., supra.

The protest is denied.

for 
Comptroller General
of the United States