

DECISION

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

FILE: B-214927

DATE: June 26, 1984

MATTER OF: S & S Contracting

DIGEST:

Contracting officer properly rejected protester's bid on certain line items as nonresponsive and awarded contract for those items to another bidder where "irrevocable letter of credit" submitted by protester to comply with IFB's bid guarantee requirement is defective because letter of credit does not name protester as principal and, therefore, government would not receive full and complete protection contemplated by IFB.

S & S Contracting (S & S) has filed a protest under invitation for bids (IFB) No. R4-2-84-12 issued by the Forest Service, United States Department of Agriculture, for tree planting services in the Boise National Forest. S & S charges that the Forest Service improperly rejected its bid as nonresponsive for failure to provide an acceptable bid guarantee as required by the IFB.

The protest is denied.

S & S contends that, under the IFB, it could and did properly submit an "irrevocable letter of credit." S & S points out that the IFB contained a sample bid bond, but no sample letter of credit. Therefore, S & S contacted the contracting officer on several occasions to ascertain the proper form for an acceptable letter of credit. The contracting officer stated that there was no required format for a letter of credit and that a standard letter of credit from the protester's bank would be acceptable. The protester obtained a standard letter of credit from its bank and submitted it with its bid. When bids were opened on March 26, 1984, S & S was the low bidder on line items Nos. 1, 2, 4 and 9. As permitted by the IFB, S & S limited its bid to require it to accept award of only two of these four line items. By letter of March 28, 1984, S & S was notified that the contracting officer had rejected its bid as nonresponsive because of deficiencies in its letter of credit. On that date, line items No. 1 and No. 4 were

029269

awarded to A & L Reforestation. Line items No. 2 and No. 9 were eventually canceled in accord with the Federal Procurement Regulations (FPR), 41 C.F.R. § 1-2.404-1(b)(5) (1983).

The Forest Service reports that the letter of credit submitted by S & S was deficient for two reasons. First, the letter of credit did not contain any indication that it was drawn on S & S's account. Second, the letter of credit contained a qualifying statement which made payment contingent upon the sight draft presented to S & S's bank being accompanied by documentary proof that the contractor (which was not named in the letter of credit) had failed to accept award of the contract or had not performed according to the solicitation. Contrary to S & S's argument that the Forest Service should have waived these irregularities as minor, the Forest Service determined that these irregularities should not be waived. Since the bid was nonresponsive, the contracting officer determined that S & S should not be given an opportunity to correct or explain its bid because that would give S & S an opportunity to accept or reject award after all bid prices had been revealed.

S & S contends that its bid was rejected solely because of the improper format of its letter of credit. S & S does not deny that its letter of credit did not name it as principal, but urges that the Forest Service could easily have ascertained that the letter of credit was issued on behalf of S & S by simply telephoning the bank. S & S also argues that, assuming that its letter of credit was deficient, it was in the government's best interest to waive the deficiencies because award of line items 1 and 9 to S & S would save the government a considerable amount of money. Other than suggesting waiver, S & S does not address the Forest Service's charge that the letter of credit was also deficient because it contained a requirement for documentary proof of nonacceptance of the contract or failure to perform properly.

A bid bond requirement is a material part of an IFB, and a contracting officer cannot generally waive the failure to comply, but must reject as nonresponsive any bid not accompanied by the required bond. See Chemical Technology, Inc., B-192893, December 27, 1978, 78-2 CPD 438, and cases cited. 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 Chemical Technology, Inc., supra.

S & S has apparently misunderstood the basis for the contracting officer's rejection of its bid. 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. See Chemical Technology, Inc., supra. However, before any instrument can be accepted as a letter of credit, it must meet certain general requirements. Here, the instrument which S & S 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.

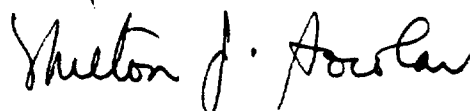
A letter of credit is essentially a third-party beneficiary contract by which a customer of a financial institution wishing to transact business induces the financial institution to issue the letter to a third party whose drafts or other demands for payment will then be honored upon the third party's 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. See Chemical Technology, Inc., supra; see, generally, Juanita H. Burns and George M. Sobley, 55 Comp. Gen. 587 (1975), 75-2 CPD 400.

The determinative question in judging the sufficiency of a letter of credit is whether the letter of credit could be enforced if a bidder does not execute the required contract documents. See Truesdale Construction Co., Inc., B-213094, November 18, 1983, 83-2 CPD 591. Generally, suretyship arises only by the express agreement of the surety (the bank) to be bound on behalf of the principal (S & S). Long's Air Conditioning, Inc., B-187566, January 6, 1977, 77-1 CPD 11. A bidder need not comply with the exact requirements relating to bid bonds in order to be

considered responsive, so long as the surety would be liable notwithstanding any deviations. See J. W. Bateson Company, Inc., B-189848, December 16, 1977, 77-2 CPD 472. However, in our opinion, since S & S was not named as principal in the surety agreement, it is doubtful whether the letter of credit could be enforced by the Forest Service, and we do not believe that the government would receive the full and complete protection it contemplated in drafting the IFB. See Juanita H. Burns and George M. Sobley, supra. We have held that a bid bond which names a principal different from the named bidder is deficient and the defect may not be waived as a minor informality. A. D. Roe Company, Inc., 54 Comp. Gen. 271 (1974), 74-2 CPD 194. Furthermore, S & S's suggestion that the contracting officer should have called the bank to ascertain that S & S was indeed the principal would not have been proper since a nonresponsive bid cannot be made responsive by actions taken after bid opening. See Truesdale Construction Co., Inc., supra; see also A. D. Roe Company, Inc., supra. Finally, although acceptance of S & S's bid might result in a monetary savings to the government in this procurement, we have often observed that the maintenance of the integrity of the competitive bidding system is more in the government's best interest than the savings to be obtained by acceptance of a nonresponsive bid. A. D. Roe Company, Inc., supra.

In view of the above, we conclude that the contracting officer properly determined that S & S was ineligible for award of a contract under this solicitation.

The protest is denied.

for 
Comptroller General
of the United States