



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Bailey Enterprises

File: B-225021

Date: March 9, 1987

DIGEST

Agency improperly determined that a bank letter of credit submitted as a 20 percent bid guarantee was deficient for failure to authorize the agency to draw sight drafts on the bank or specify the dollar amount of the credit since neither omission would appear to affect the validity of the letter of credit, and the penal sum of a bid guarantee may be expressed as a percentage of the bid.

DECISION

Bailey Enterprises protests the rejection of its low bid under invitation for bids (IFB) No. R1-10-86-20 issued by the Flathead National Forest, Kalispell, Montana. The agency rejected the bid as nonresponsive because it was not accompanied by an acceptable bid guarantee. Bailey contends that the letter of credit it submitted with its bid was indeed acceptable. We sustain the protest.

The solicitation, for the removal of an existing log bridge and the construction of a concrete bridge, required a bid guarantee in the amount of 20 percent of the total bid price. A bid guarantee assures that the bidder will not withdraw the bid during the bid acceptance period and will execute a written contract and furnish payment and performance bonds, if required. The solicitation stated that the failure of a bidder to furnish a bid guarantee in the proper form and amount might be cause for rejection of the bid. Among the various forms of security listed as acceptable bid guarantees was an irrevocable letter of credit.

Bailey's bid of \$35,218 was the lowest of four bids received. As its bid guarantee, Bailey submitted a letter signed by an

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assistant cashier of the Citizens State Bank, Hamilton, Montana, addressed to the contracting agency. The letter read:

"This letter will serve as an irrevocable letter of credit for the purpose of bid guarantee of 20% for Bailey Enterprises in regard to the South Fork Lost Creek Bridge-Road No. 680, Solicitation #R1-10-86-20."

The agency determined that the letter of credit was not acceptable as a bid guarantee because it did not contain an authorization to draw sight drafts in favor of the Forest Service and did not specify the dollar amount of the credit extended. The agency rejected Bailey's bid and awarded a contract to the second lowest bidder, Sudan Logging, Inc., at \$39,183.04. The notice to proceed has been withheld pending the resolution of this protest.

Bailey argues that the letter of credit was acceptable since it cited the name of the contracting agency, the solicitation and the project to which it applied, and the amount (20 percent of the bid price) for which the issuer would be liable. The contracting agency now contends that in addition to the lack of express sight draft authorization and a specific dollar amount, the letter of credit also was not an acceptable bid guarantee because it failed to comply with several other requirements for letters of credit listed in the Forest Service Manual. Section 6506.64(1) of the Manual (amend. No. 199) provides that a letter of credit must include a letter of credit number, a clear statement that the letter of credit number appearing on a sight draft is sufficient identification for honoring the drafts, and an unqualified expiration date for presentation of sight drafts for payment. In connection with the last requirement, the agency cites our decision Daniel R. Hinkle, B-220163, Dec. 9, 1985, 85-2 CPD ¶ 639.

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. Alan L. Crouch, B-207653, Oct. 19, 1982, 82-2 CPD ¶ 345. Whether an offered letter of credit will suffice as a bid guarantee depends on whether the credit could be enforced against the issuer if the bidder fails to execute required contract documents. S&S Contracting, B-214927, June 26, 1984, 84-1 CPD ¶ 670.

Although a letter of credit may condition the obligation of the issuer on the third party's production of specified documents, see, e.g., Juanita H. Burns and George M. Sobley, 55 Comp. Gen. 587 (1975), 75-2 CPD ¶ 400 (letter required production of withdrawal application signed by the customers), or may expressly authorize the beneficiary of the letter to draw sight drafts, Shockley Construction Co., B-200125, Nov. 10, 1980, 80-2 CPD ¶ 352, there is no requirement that it do either. In this connection, Article 5 of the Uniform Commercial Code (U.C.C.) states that it applies to a letter of credit issued by a bank that does not provide for such a documentary draft or documentary demand for payment if the letter "conspicuously states that it is a letter of credit." U.C.C. § 5-102(1)(2).^{1/} Aside from this requirement, no particular form of phrasing is required for a letter of credit. U.C.C. § 5-104(1). Here, the letter from Citizens State Bank conspicuously stated that it was a letter of credit. Thus, even though the letter did not require or authorize sight drafts, we do not think this affected its status as an Article 5 letter of credit.

Further, a letter of credit is defined as an engagement by a bank to honor drafts or other demands for payments upon compliance with the terms of the letter. U.C.C. § 5-103(1)(3). The letter here addressed to the agency expressly stated that it was intended as a bid guarantee on behalf of a named bidder in connection with a specified procurement, with no conditions. The IFB referred to in the letter provided that if the bidder failed to execute the required contract documents or furnish the required bonds, the agency could terminate the contract for default and use the bid guarantee to offset any excess reprocurement costs. In our view, the letter constituted the bank's promise to honor the agency's demands for payment should collection under the bid guarantee become necessary.

With respect to the failure of the letter of credit to state a specific dollar value limitation, our decisions recognize that a bid guarantee may be stated as a percentage. See, e.g., Tom Mistick & Sons Inc., B-222326, Apr. 3, 1986, 86-1 CPD ¶ 323. The letter of credit here stated that it was a bid guarantee of 20 percent.

^{1/} Montana, where the contract was awarded and will be performed, has adopted the Uniform Commercial Code provisions applicable to letters of credit. Mont. Code Ann. § 30-5-101 et seq. (1985).

The contracting officer cites the failure of the letter of credit to contain an unqualified expiration date for presentation of sight drafts as an additional reason for questioning the validity of the letter as a bid guarantee, relying in part on Daniel R. Hinkle, B-220163, supra. In that case, we said that since the letter of credit did not contain an expiration date for presentation of drafts for payment it was doubtful whether the letter could be enforced. In Hinkle, however, the letter of credit also did not refer to the IFB number or indicate that it was submitted in connection with the particular services being procured. There was also a dispute as to whether the amount of the credit was sufficient. Thus, the lack of an expiration date was not the sole reason for finding that the letter of credit failed to constitute a firm bid guarantee. In any event, we are unaware of any requirement that a letter of credit contain a fixed expiration date in order to be enforceable against the issuer. Rather, it appears that where a letter of credit lacks an expiration date, a reasonable time for demanding payment under the letter will be implied. 50 Am. Jur. 2d Letters of Credit § 16 (1970). Since the letter here stated that it was irrevocable and that its purpose was to serve as a bid guarantee, it is certainly reasonable to assume that the letter of credit, dated September 22 for a September 24 bid opening, would remain outstanding through the total period of 45 days allowed under the IFB for the agency to accept the bid and for the bidder to furnish performance and payment bonds.

The Forest Service Manual does list a number of items that letters of credit "must include." In our view, however, such a listing does not affect the enforceability of a letter of credit as against the issuer, but merely imposes additional requirements of the Forest Service. In this connection, section 6506.3 of the Forest Service Manual provides that such requirements shall be placed in the IFB, which did not occur here. In this case, the solicitation stated that an irrevocable letter of credit would suffice as a bid guarantee, and that is exactly what Bailey furnished.

We sustain the protest. We recommend that the agency terminate for convenience the contract awarded to Sudan Logging, Inc., and award a contract to Bailey Enterprises if that firm is otherwise eligible for award.

for Milton J. Hogan
Comptroller General
of the United States