

Barry



The Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

Matter of: Noslot Cleaning Services, Inc.

File: B-228538

Date: January 21, 1988

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### DIGEST

1. Bid bond is defective, thus rendering bid nonresponsive to solicitation requirement for bid guarantee, where the attached power-of-attorney form from the surety only authorized the attorney-in-fact to execute a bond eligible for the Small Business Administration's Surety Bond Guarantee Program and the amount of the contemplated contract exceeded the limit for participation in the program.
2. An irrevocable letter of credit submitted as a bid guarantee pursuant to which the surety agrees to pay the contracting agency any money owed it by the bidder in connection with the invitation for bids is a valid bid guarantee notwithstanding that it also incidentally refers to performance under the contract.
3. Bidder's failure to provide current financial data with its bid does not render the bid nonresponsive to solicitation request for financial information since the information relates to responsibility and the bidder therefore should be afforded a reasonable opportunity after bid opening to provide it.

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### DECISION

Noslot Cleaning Services, Inc., protests award to any other bidder under invitation for bids (IFB) No. GS-11P-87-MJC-0107, issued by the General Services Administration (GSA), for custodial services at Federal Building Number 4 in Suitland, Maryland, and at the Social Security Administration Building in Clinton, Maryland. Noslot asserts that all bids but its own apparent high bid should be rejected as nonresponsive.

We deny the protest.

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Seven bids were received by GSA; the agency found the apparent low, third low and sixth low bids to be nonresponsive. As noted above, Noslot's was the highest.

Noslot asserts that Diplomatic Painting and Building Services Co., Inc., the apparent second low bidder, has failed to satisfy the solicitation requirement for a bid guarantee in an amount equivalent to 20 percent of the annual bid price for the initial 12-month period of the contemplated contract. We agree.

Diplomatic's bid was accompanied by a bid bond that listed Diplomatic as principal and Transamerica Premier Insurance Company as surety. In the space provided for the surety, the bond bore the signature of William Peck, who was identified as "Attorney-in-Fact." Although Transamerica had attached a power-of-attorney form to its bond appointing William Peck, attorney-in-fact for Transamerica, the form only authorized Mr. Peck to execute "Contract Bonds (S.B.A. Guarantee Agreement)-Maximum Penalty \$250,000.00." Under its Surety Bond Guarantee Program, the Small Business Administration (SBA) may guarantee up to 90 percent of the loss incurred and paid by a surety under a bond provided on behalf of a small business. 13 C.F.R. part 115 (1987). Contracts exceeding \$1,250,000 in face value, however, are not eligible for the program. 15 U.S.C. § 694b (1982), as amended by the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, 100 Stat. 82, 370 (1986). Diplomatic's bid of the base and 4 option years of the contemplated contract totaled \$1,274,620.44; accordingly, SBA has determined that an SBA guarantee is not available.

A bid bond or bid guarantee is a type of security that assures that the bidder will not withdraw its bid within the time specified for acceptance and, if required, will execute a written contract and furnish payment and performance bonds. The purpose of the bid bond is to secure the liability of a surety to the government if a bidder fails to fulfill these obligations. Thus, we have held that a bid bond in the proper amount is regarded as defective, rendering the bid nonresponsive, if it is not clear that it will bind the surety. See Baldi Brothers Constructors, B-224843, Oct. 9, 1986, 86-2 CPD ¶ 418. Since the power-of-attorney form provided with Diplomatic's bid only authorized Mr. Peck to execute bonds in connection with an SBA guarantee, and the amount of the contemplated contract exceeded the limit for participation in SBA's Surety Bond Guarantee Program, there was uncertainty as to whether Mr. Peck was authorized to bind the surety; Diplomatic's bid therefore was nonresponsive to the solicitation requirement for a bid guarantee and should not be acceptable for award.

Noslot contends that the irrevocable letter of credit from Inter-City Financial Services Corporation provided by J&L Janitorial Services, Inc., the apparent fourth low bidder, as the firm's bid guarantee was defective because its intent was to guarantee performance of the contract, not to guarantee the bid. In support of its contention, Noslot cites language in the letter of credit that the letter was issued as "security for the performance by J&L Janitorial Services [of] awards, extensions of credit, advance of funds," and agreeing to pay GSA money that may become due it from J&L "according to the agreed upon terms and conditions of your request for bids for the General Services Administration contract award . . ., arising out of their activities in connection with their performance under contract(s)." We disagree with Noslot's position.

The solicitation incorporated the standard bid guarantee clause set forth in the Federal Acquisition Regulation (FAR), § 52.228-1, which authorizes the use of an irrevocable letter of credit as a bid guarantee. 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. 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 failed to execute the required contract documents. See Bailey Enterprises, B-225021, Mar. 9, 1987, 66 Comp. Gen. \_\_\_, 87-1 CPD ¶ 265.

In addition to the language quoted above in which Inter-City agreed to pay GSA money owed it by J&L "according to the agreed upon terms and conditions of your request for bids," the letter of credit explicitly guaranteed payment of up to 20 percent of J&L's bid amount in connection with IFB No. GS-11P-87MJC-0107, the specific solicitation at issue here. The IFB referred to in the letter provides that if the bidder fails to execute the required contractual documents or furnish the required bonds, the agency may terminate the contract for default and use the bid guarantee to offset any excess costs of procurement. By reference, therefore, the letter clearly is intended to encompass those matters required in a bid guarantee, not, as Noslot suggests, to exclude them. The letter thus constitutes an irrevocable promise to honor the agency's demands for payment should collection under the bid guarantee become necessary, and therefore is fully responsive to the solicitation.

The solicitation also requested bidders to submit with their bids evidence of their financial responsibility and resources, instructing them to provide this information on

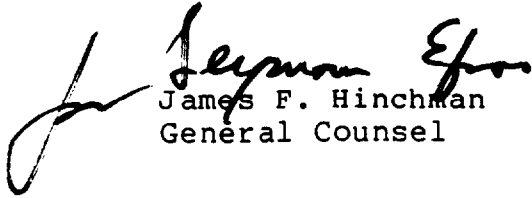
GSA Standard Form (SF)-527, "Contractor's Qualifications and Financial Information." Noslot asserts that J&L's bid also is nonresponsive because the SF-527 submitted with the bid is dated August 14, 1986, and therefore is not current. We disagree.

Evidence of a bidder's financial resources concerns the bidder's responsibility, or ability to perform the contract; it is not relevant to the responsiveness of the bid, which is a question of whether the bidder has offered to perform in accordance with the material terms and conditions of the IFB. See All Clean, Inc., B-228608, Aug. 12, 1987, 87-2 CPD ¶ 154; Darby Marine & Supply Inc., B-228653, Aug. 7, 1987, 87-2 CPD ¶ 653. This is true even where the solicitation requires submission of the information with a bid; a requirement which relates to responsibility cannot be treated as a matter of responsiveness because a contracting agency cannot convert a matter of responsibility into one of responsiveness by the terms of the solicitation. Since information bearing on bidder responsibility may be provided anytime prior to award, a bidder should be afforded a reasonable opportunity after bid opening to provide requested information concerning its responsibility. All Clean, Inc., B-228608, supra; Tri-S, Inc., B-226793.2, June 26, 1987, 87-1 CPD ¶ 634; see General Services Administration Acquisition Regulation, 48 C.F.R. § 509.105-70(d) (1986). The agency states that it will request additional financial data from J&L if the firm is otherwise eligible for award.

We will not consider Noslot's allegations concerning the responsiveness of the bid submitted by Housekeeper Maintenance Service & Supply Co., Inc., the apparent fifth low bidder; Noslot is not an interested party to raise this issue within the meaning of our Bid Protest Regulations, 4 C.F.R. § 21.0 (1987). Specifically, our denial of Noslot's protest with respect to J&L, whose bid is lower than Noslot's, means that Noslot would not be in line for award even if we sustained its protest with regard to Housekeeper. In arguing that it does have standing to protest, Noslot cites Solon Automated Services, Inc. v. United States, 658 F. Supp. 28, 31 (D.D.C., 1987), and on Ulstein Maritime, Ltd. v. United States, 646 F. Supp. 720, 728 (D.R.I., 1986), for the proposition that a bidder need not be in line for award in order to have standing to challenge the propriety of a procurement. The reliance is misplaced. The standards enunciated in those cases concern

matters raised for judicial review, not protests filed with the General Accounting Office, which are subject to the terms of our Regulations.

The protest is denied.



James F. Hinchman  
General Counsel