



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Meridian Construction Co., Inc.

File: B-230566

Date: June 8, 1988

DIGEST

Where letter of credit submitted as a bid guarantee contains language of a condition which renders the letter, at best, ambiguous, as a consequence of which the enforceability of the instrument is uncertain, the accompanying bid is properly rejected as nonresponsive since the bid guarantee, a material part of the bid, does not provide a firm commitment as required by the solicitation.

DECISION

Meridian Construction Co., Inc., protests the rejection of its ostensibly low bid as nonresponsive for failure to provide an adequate bid guarantee as required by invitation for bids (IFB) No. N62477-86-B-0042 issued by the Department of the Navy for the construction of bachelor quarters at the Navy Ordnance Station, Indian Head, Maryland. Meridian contends that the letter of credit it submitted complies with the bid guarantee provisions of the solicitation.

We deny the protest.

The IFB required that each bidder submit with its bid a bid guarantee in the amount of 20 percent of the largest amount for which award can be made under the bid submitted (the base bid plus the additive item--essentially, landscaping for the quarters grounds) but not to exceed \$3 million. The IFB further required that the bid guarantee be furnished in the form of a firm commitment and stated that failure to furnish a bid guarantee in the proper form and amount by the time of bid opening may be cause for rejection of the bid. See 48 C.F.R. §§ 28.101-3(b) and 52.228-1 (1988).

Meridian submitted as its bid guarantee an irrevocable letter of credit issued by Security Trust Company of Arlington, Texas, on December 18, 1987. The letter, which was in the amount of 20 percent of Meridian's bid, stated that the credit was available against wiring instructions until April 18, 1988, subject, however, to "strict adherence

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by the Beneficiary to the following conditions," one of which states:

"(2) Drafting instructions by wire must be preceded by Solicitation No. N62477-86-B-0042 duly executed by the Beneficiary hereof to SECURITY TRUST COMPANY or its designee."

The Navy rejected the letter of credit submitted by Meridian as a bid guarantee because enforcement of the letter of credit is conditioned upon the government's execution or assignment of the solicitation to Security Trust or its designee and, therefore, it is not a firm commitment as required by the solicitation. The Navy also rejected the letter of credit submitted by the protester on the basis that it is ambiguous as to whether, for the purpose of establishing the maturity date and the "irrevocability" of the instrument, acceptance of it is to be by the bidder or by the beneficiary--that is, the government.

Meridian contends the letter of credit it submitted is an irrevocable, unconditional, firm commitment. The protester states that the word "conditions" in the letter "is used in a generic, non-legal sense" and that the language of condition in the letter is only to "advise the beneficiary" as to how to obtain payment. The protester further contends that the letter is not ambiguous as to acceptance since under the Uniform Commercial Code (UCC) § 5-106(1)(b), "delivery makes the letter binding."

The purpose of a bid guarantee is to secure the liability of a surety to the government for excess costs of procurement in the event that the bidder fails to fulfill its obligation to execute a written contract and furnish payment and performance bonds. BKS Construction Company, B-226346, B-226347, May 28, 1987, 66 Comp. Gen. ____, 87-1 CPD ¶ 558. The sufficiency of a letter of credit as a bid guarantee depends upon whether the government will be able to enforce it if enforcement becomes necessary. Where, due to the language in a letter of credit, the enforceability of the instrument is uncertain, the letter does not constitute a firm commitment within the meaning of the bid guarantee clause prescribed by the Federal Acquisition Regulation. Id. In such an instance, the bid must be rejected as nonresponsive since the bid guarantee is a material part of the bid. Pyramid Contracting, Ltd., B-228752.2, Nov. 2, 1987, 87-2 CPD ¶ 432.

As the protester observes in its comments on the agency report, in Pyramid Contracting, Ltd., B-228752.2, supra, our Office considered the effect of a similarly stated condition in a letter of credit which, as here, was issued by Security

Trust Company of Arlington, Texas. That condition required that:

"Drafting instructions by wire must be preceded by the assignment of [the solicitation] duly executed by the Beneficiary hereof to the Security Trust Company or its designee."

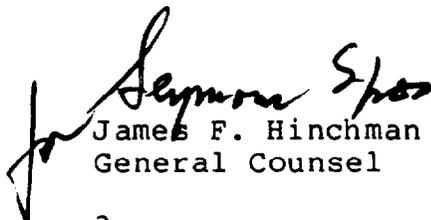
In the Pyramid decision, we concluded that in view of the inclusion of this condition in the letter, the letter is "at best ambiguous and does not clearly establish the surety's liability" (Pyramid Contracting, Ltd., B-228752.2, supra at 3), particularly since the letter requires "strict adherence by the Beneficiary" to its conditions. However, nothing would remain to be assigned following the termination for default of the resulting contract if the contractor should fail to properly execute it.

Meridian maintains that our holding in Pyramid is not applicable in this instance because unlike the letter of credit in that case, the letter it submitted does not require an assignment and, in fact, the "assignment" language "was specifically deleted in the instant letter of credit." It is Meridian's position that the conditions stated in its letter of credit are merely "drafting instructions."

We disagree. The clause at issue here is identical to the clause under dispute in Pyramid, except for its phrase "the assignment of." Nonetheless, the deletion of that phrase does not alter the meaning or effect of the condition whatsoever, since it is still subject to interpretation as requiring that the solicitation (or, more properly, the resulting contract) be "duly executed . . . to" Security Trust Company or its designee. Thus, as in Pyramid, the letter of credit does not clearly establish the surety's liability since this condition, at best, renders the letter of credit ambiguous.

Accordingly, the Navy properly rejected Meridian's bid as nonresponsive. In view of this finding, we need not reach the question as to the ambiguity of the time and manner of acceptance of the letter. BKS Construction Company, B-226346, B-226347, 66 Comp. Gen. supra.

The protest is denied.


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