



**The Comptroller General  
of the United States**

Washington, D.C. 20548

## **Decision**

**Matter of:** Waste Conversion, Inc.

**File:** B-231524

**Date:** August 16, 1988

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### **DIGEST**

Where a letter of credit submitted as a bid guarantee contains conditional language that creates uncertainty as to whether the letter would be enforceable against the issuer, the bid is properly rejected as nonresponsive, since the letter does not provide the required firm commitment.

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### **DECISION**

Waste Conversion, Inc., protests the rejection of its apparent low bid as nonresponsive for failure to include an adequate bid guarantee, as required by invitation for bids (IFB) No. DACW45-88-B-0025, issued by the Army Corps of Engineers for cleanup work at a Superfund site in Massachusetts. Waste Conversion contends that the letter of credit it submitted complies with the bid guarantee provisions of the IFB.

We deny the protest.

The IFB required that each bidder submit with its bid a bid guarantee in the form of a firm commitment, and stated that failure to meet the requirement would be cause for rejection of the bid. Waste Conversion submitted as its bid guarantee an irrevocable letter of credit issued by Security Trust Company of Arlington, Texas. The letter stated that the credit was available against wiring instructions, subject to strict adherence by the beneficiary (the government) to several conditions, among them the following:

"(2) Drafting instructions by wire must be preceded by Solicitation No. DACW45-88-B-0025 duly executed by the Beneficiary hereof to Security Trust Company or its designee."

The Army rejected the letter of credit, and the bid as nonresponsive, on the ground that, since enforcement of the

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letter was conditioned on the government's "execution" or, apparently, assignment of the solicitation, the letter was not a firm commitment as required by the IFB.

Waste Conversion contends that the letter it submitted is an irrevocable, unconditional, and firm commitment, and asserts that the condition at issue is merely advisory; it gives instructions to the government on how to obtain payment in one of the several ways available to it (namely, by wire), and has no other effect.

The purpose of a bid guarantee is to secure the liability of a surety to the government for excess costs of reprourement in the event the bidder fails to fulfill its obligation to execute a written contract and furnish payment and performance bonds. BKS Construction Co., B-226346, B-226347, May 28, 1987, 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 instrument 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.

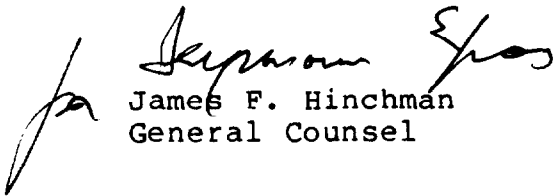
The language in issue here is the result of a revision effected by Security in response to our decision in Pyramid, B-228752.2, supra, where we considered the effect of the following conditional language in a letter of credit:

"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."

While we found this language ambiguous, we read the condition as most likely requiring assignment of the contract awarded pursuant to the solicitation. Since failure by the firm to execute the contract properly could be cause for terminating the contract for default, at which point no valid contract that could be assigned would exist, we concluded that the government would not be able to enforce the letter of credit in the event of the bidder's default because of the condition. As the letter of credit thus did not clearly establish the surety's liability, it was an unacceptable bid guarantee, and the bid was nonresponsive.

Waste Conversion contends that our holding in Pyramid is not applicable here because Security Trust now has specifically deleted the reference to "assignment" from its letter of credit. However, we already have considered the effect of the exact language at issue here with regard to another letter of credit issued by Security Trust. In our decision, Meridian Construction Co., Inc., B-230566, June 8, 1988, 88-1 CPD ¶ 544, we concluded that Security's deletion of the words "the assignment of" did not alter the meaning or effect of the condition; the language still is subject to interpretation as requiring that the awarded contract be "duly executed . . . to" Security Trust or its designee. While it is not clear what effect would be given this language, we found it, at best, ambiguous, and the instrument thus inadequate to clearly establish the surety's liability. Our holding in Meridian is directly applicable to the language in the case at hand, and we therefore conclude that Waste Conversion's bid properly was rejected as nonresponsive.

The protest is denied.



James F. Hinchman  
General Counsel