



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Cos-Mil, Inc.

File: B-235480

Date: June 26, 1989

DIGEST

A bid guarantee, in the form of an irrevocable letter of credit, must remain available to the government for at least the entire bid acceptance period.

DECISION

Cos-Mil, Inc., protests the rejection of its bid as non-responsive for failing to provide an adequate bid guarantee as required by invitation for bids (IFB) No. GS-11P-88MJC-0121, issued by the General Services Administration (GSA) for guard services.

We deny the protest.

The IFB required that bidders submit a bid guarantee in the amount of 20 percent of the bid price. The IFB also indicated that the government's minimum bid acceptance period was 120 days and stated: "A bid allowing less than the Government's minimum acceptance period will be rejected." Bid opening was March 3, 1989.

Cos-Mil submitted with its bid an irrevocable letter of credit from FinanCorp, Inc., to satisfy the bid guarantee requirements. The letter of credit was said to be effective from March 3 to May 30, a total of 88 days. The letter of credit stated that:

"[A]ll drafts drawn under and in compliance with the terms of this credit will be duly honored on delivery of documents as specified if presented at this office on or before May 30, 1989; unless otherwise extended in writing by us."

By letter dated April 27, GSA notified Cos-Mil that its bid was nonresponsive for failure to provide an adequate bid guarantee. The GSA determined that the bid guarantee was

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inadequate because it was not effective for the entire bid acceptance period and the stated acceptance period could be extended only by FinanCorp.

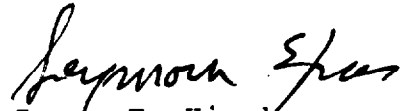
Cos-Mil protests that its bid is responsive, since its letter of credit indicated that the acceptance period could be extended. According to Cos-Mil, the acceptance period contained in the letter of credit was a minor defect which could have been cured with no negative impact on the competitive process. Cos-Mil argues that it should have been given an opportunity to extend the acceptance period.

A bid guarantee, including a properly drawn irrevocable letter of credit, is to secure the liability of a surety to the government for excess costs of reprocurement in the event that the bidder fails to fulfill its obligation to execute a written contract and furnish payment and performance bonds. Meridian Constr. Co., Inc., B-230566, June 8, 1988, 88-1 CPD ¶ 544. 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 and the bid must be rejected as nonresponsive since the bid guarantee is a material part of the bid. Id.

We agree with GSA that Cos-Mil did not provide an adequate bid guarantee. Since a bid guarantee is used to protect the government in the event the awardee does not furnish the required performance and payment bonds, we have previously recognized that a bid guarantee in the form of an irrevocable letter of credit must remain available to the government for at least the entire bid acceptance period. Kruckenbergs Serv. Co., B-232377, Oct. 18, 1988, 88-2 CPD ¶ 366; Control Cent. Corp.; American Technical Servs., Inc., B-214466.2; B-214466.3, July 9, 1984, 84-2 CPD ¶ 28. Here, where the IFB specified a 120-day bid acceptance period, a bid guarantee limited to 88 days clearly expires short of the time frame needed for the government to exercise its rights if the bidder fails to furnish the required bonds. Cos-Mil's argument that this period could be extended does not cure the defect since such extension is solely at the discretion of the guarantor, FinanCorp, and thus the government's need to have a guarantee effective for the entire acceptance period is jeopardized. Moreover, GSA could not provide Cos-Mil an opportunity to extend the acceptance period in the letter of credit since a nonresponsive bid cannot be made responsive by actions taken after bid opening. G&G Steel, Inc., B-225750, Apr. 1, 1988, 88-1 CPD ¶ 54. Contrary to Cos-Mil's assertions that the defect

here is a minor one which can be waived, noncompliance with this bid guarantee requirement can only be waived under those limited conditions specified in the Federal Acquisition Regulation § 28.101-4 (FAC 84-12), none of which are present here.

Accordingly, the protest is denied.



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General Counsel