



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Cos-Mil, Inc.

File: B-235342

Date: September 5, 1989

DIGEST

1. Where the issuer of a letter of credit submitted as a bid guarantee is neither a bank nor an otherwise regulated financial institution, it is appropriate for the contracting agency to examine not only the form and content of the letter of credit, but also to ascertain the financial responsibility of the issuer, and a bidder may properly be found nonresponsible if it fails to provide adequate evidence in a timely fashion indicating that the issuer of its letter of credit is financially sound.

2. Where agency has significant unresolved doubts about financial capability of the bid guarantee surety who issued an irrevocable letter of credit, the bidder's offer that the surety place cash in an escrow account is not sufficient additional security to form an adequate basis to accept the surety.

3. The fact that one contracting agency may have accepted a letter of credit from the protester's surety in an earlier procurement does not compel another agency to accept a letter of credit from the same surety where based on the information presented to it the second agency reasonably determined the surety to be unacceptable.

DECISION

Cos-Mil, Inc. protests the rejection of its bid under invitation for bids (IFB) No. GS-11P89MJC0004, issued by the General Services Administration (GSA) for the procurement of security guard services at a Bethesda, Maryland, location. Cos-Mil contends that its bid was improperly rejected based on the contracting officer's unwarranted finding that its surety was nonresponsible.

We deny the protest.

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The IFB contained the standard bid guarantee clause, Federal Acquisition Regulation (FAR) § 52.228-1 (FAC 84-26), which required bidders to furnish a bid guarantee in the form of a firm commitment. An irrevocable letter of credit was identified as an acceptable bid guarantee instrument. Cos-Mil submitted as its bid guarantee an irrevocable letter of credit in the amount of \$52,000 issued by FinanCorp, Inc., a management and financial services firm incorporated in March 1988.

To verify the acceptability of the letter of credit, the contracting officer obtained a "Dunn and Bradstreet" report and a "TRW" credit report on FinanCorp. These reports indicated that there was a lawsuit for \$130,944.35 pending against the company and that FinanCorp had given a security interest in accounts receivable, contract rights, chattel paper and inventory to the Industrial Bank of Washington. Based on these reports, the contracting officer, by letter dated March 16, requested Cos-Mil to provide additional information on FinanCorp, including a list of all outstanding letters of credit (in verifiable format) and a current, certified audited financial statement. Cos-Mil was asked to provide this information as soon as possible, but no later than 7 calendar days after receipt of the letter.

By letter dated March 22, Cos-Mil provided a list of outstanding letters of credit and a copy of FinanCorp's "internal financial statement" with a letter from a certified public accountant (CPA) noting that no "material change in the net worth as originally shown on the company's internally generated financial statement" was anticipated. Cos-Mil advised the contracting officer that a certified financial statement would not be available until March 30. The list of outstanding letters of credit indicated potential bid guarantee obligations exceeding \$365,000. Additionally, two letters of credit, totaling \$93,000, were not included on the list. The unaudited financial statement showed a net working capital of approximately \$300,000 with an average net pre-tax income of less than \$10,000 per month. This statement did not reflect any outstanding letters of credit issued by FinanCorp or the pending lawsuit.

The contracting officer spoke with the CPA on March 24. According to GSA, the CPA advised the contracting officer that he was working on FinanCorp's financial statement but the CPA "expressed unfamiliarity" with FinanCorp's net worth and had no knowledge of the lawsuit pending against the firm. The contracting officer, by letter dated March 26, informed Cos-Mil that the audited financial statement and a verified list of outstanding letters of credit were due no

later than the close of business on March 30. Although Cos-Mil provided the necessary information concerning the letters of credit in a letter dated March 30, Cos-Mil indicated that the audited financial statement was not complete. By phone on March 31, the president of Cos-Mil informed the contracting officer that the audited financial statement would be complete in 2 to 3 weeks. The contracting officer advised the president that the government could not wait the additional time and that, if the audited financial statement were not received by the close of business that day, the letter of credit would be evaluated based on the available information.

By letter dated April 20, the contracting officer advised Cos-Mil that its bid was rejected because the issuer of Cos-Mil's letter of credit was nonresponsible. Cos-Mil challenges GSA's rejection of its letter of credit as unacceptable, contending that the contracting officer did not afford Cos-Mil the opportunity to cure any perceived defect in the bid guarantee.

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 procurement in the event that the bidder fails to fulfill its obligation to execute a written contract and furnish payment and performance bonds. Kentucky Bridge and Dam, Inc., B-235806, July 17, 1989, 89-2 CPD ¶ ____. 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 the required contract documents. C.W. Constr., Inc., B-233086 et al., Feb. 14, 1989, 89-1 CPD ¶ 153. Although the issuer of a letter of credit is normally a bank or a regulated financial institution, other entities may serve as issuers if otherwise acceptable to the government. Id.

We have recognized that when the issuer is neither a bank nor a regulated financial institution, but a newly incorporated business, it is reasonable for the agency to conduct an inquiry into the financial status of the issuer. C.W. Constr., Inc., B-233086 et al., supra. In this regard, it is important for the agency to be assured of the issuer's financial status because if it lacks the resources to honor its letter of credit, the agency would be unable to enforce the credit against it, thus, defeating the purpose of the bid guarantee. Consequently, as with an individual surety, it is appropriate for the contracting agency to ascertain the financial status of the issuer in case it is called upon to honor the letter of credit.

Here, the contracting officer noted that FinanCorp had only \$300,000 in net working capital and minimal income which, as we noted above, did not reflect the \$365,000 in outstanding letters of credit or the pending lawsuit. In addition, a large percentage of FinanCorp's current assets were primarily derived from a "GARP" or "Government Accounts Receivable Program" which is comprised of accounts receivable from small businesses secured by an assignment of the proceeds from the contracts, and the agency found that it was unclear to what extent these assets were pledged as collateral for the security interests held by the Industrial Bank of Washington.

The determination of the acceptability of a corporate issuer of a letter of credit is a matter of responsibility and in making this determination, the agency is vested with a wide degree of discretion and business judgment. C.W. Constr., Inc., B-233086 et al., supra. Here, the contracting officer did not abuse his discretion in attempting to ascertain, with some degree of certainty, the financial strength of the issuer of Cos-Mil's letter of credit. Moreover, in view of the significant unresolved questions about the issuer of the letter of credit, the contracting officer reasonably rejected that surety. Id.

Further, an agency is not required to delay award indefinitely while a bidder attempts to cure a problem of responsibility and it may set a reasonable deadline for receipt of information concerning the bidder's responsibility. C.W. Constr., Inc., B-233086 et al., supra. Here, the agency requested Cos-Mil from March 16 until March 31 to provide the necessary information and award was not made until April 16. The protester has still not provided the requested information.

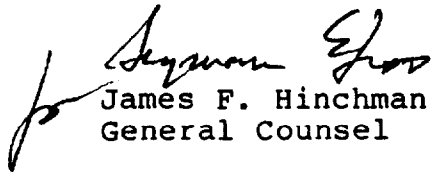
Cos-Mil also alleges that the contracting officer abused his discretion by refusing to accept FinanCorp's purported offer to place cash in an escrow account to cover the penal sum of the bid bond. Cos-Mil alleges this substitute surety is allowed by FAR § 52.228-2. The president of Cos-Mil submitted an affidavit stating that he personally informed the contracting officer of FinanCorp's offer.

Our Office previously has held that additional security in the form of a cashier's check was an adequate basis to support an agency finding of surety financial responsibility. Transcontinental Enters., Inc., 66 Comp. Gen. 549 (1987), 87-2 CPD ¶ 3; Advance Bldg. Maintenance Co., B-176849, Jan. 2, 1973. However, we do not regard cash in an escrow account to be equivalent to a cashier's check. In this regard, FAR § 52.228-1 provides that the proper form

of a bid guarantee is limited to "a firm commitment, such as a bid bond, postal money order, certified check, cashier's check, irrevocable letter of credit, or under Treasury Department regulations, certain bonds or notes of the United States." Since cash in an escrow account is not one of the enumerated "firm commitments," we do not believe it is sufficient additional security to form an adequate basis to accept an otherwise unacceptable surety. In any event, the contracting officer denies that an offer to establish a cash escrow account was made and the purported offer has not been confirmed by the surety.

Finally, Cos-Mil alleges that the GSA and other agencies have accepted from FinanCorp letters of credit presumably similar to the one provided in the instant case. However, the fact that a contracting agency may have accepted a letter of credit from the protester's surety in an earlier procurement does not compel the contracting officer here to do so where based on the information presented to him he reasonably determines the surety is unacceptable. C.W. Constr., Inc., B-233086 et al., supra.

Accordingly, the protest is denied.


James F. Hinchman
General Counsel