



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Kentucky Bridge and Dam, Inc.--
Reconsideration

File: B-236218.2

Date: February 23, 1990

Gerald M. Woodcox, Esq., for the protester.
Richard P. Burkard, Esq., Andrew T. Pogany, Esq., and
Michael R. Golden, Esq., Office of the General Counsel, GAO,
participated in the preparation of the decision.

DIGEST

Request for reconsideration of prior decision is denied where protester fails to show any error of fact or law that would warrant reversal or modification of prior decision.

DECISION

Kentucky Bridge and Dam, Inc., requests that we reconsider our decision, Kentucky Bridge and Dam, Inc., B-236218, Nov. 2, 1989, 89-2 CPD ¶ 415, in which we denied Kentucky Bridge and Dam's protest against the rejection of its bid as nonresponsive under invitation for bids (IFB) No. N62766-88-B-2486, issued by the Department of the Navy for exterior painting of family housing units. We deny the request for reconsideration.

The IFB required bidders to submit a bid guarantee in the amount of 20 percent of the bid price or \$3 million, whichever was less. The IFB required bidders, unless otherwise specified in the bid, to allow 90 days for acceptance of the bid. The IFB provided that the contractor furnish performance and payment bonds within 15 calendar days after contract award. The IFB also cautioned bidders that failure to furnish a bid guarantee in the proper form and amount, by the time set for opening of bids, may be cause for rejection of the bid.

Kentucky Bridge and Dam, the apparent low bidder, submitted with its bid an irrevocable letter of credit which was effective for 95 days from bid opening. The Navy determined that the bid guarantee was inadequate because it was not effective for the entire bid acceptance period (90 days)

plus such time as might be reasonably necessary for the Navy to exercise its rights in the event that Kentucky Bridge and Dam failed to comply with the requirement to furnish performance and payment bonds within 15 calendar days after award. We concluded that the rejection of Kentucky Bridge and Dam's bid as nonresponsive was proper.

In its request for reconsideration, Kentucky Bridge and Dam argues that because its letter of credit did not expire until 5 days after expiration of the bid acceptance period, there was sufficient time for it to have furnished the required bonds. It asserts that it had made prior arrangements with its bonding company to supply payment and performance bonds before the expiration of the bid acceptance period, leaving the Navy with five full days to draw on Kentucky Bridge and Dam's letter of credit if it failed to furnish appropriate bonds. Thus, it argues, the 15 day period should not be used to measure what constitutes a reasonable time after the bid acceptance period in which to exercise the government's rights under its letter of credit.

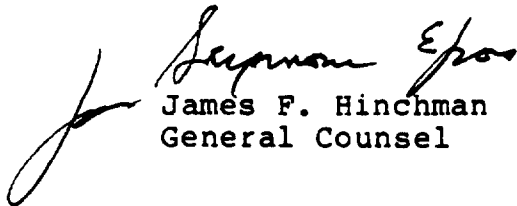
As we stated in our previous decision, the purpose of a bid guarantee is to secure the surety's liability to the government for excess procurement costs in the event that the bidder fails to furnish the required bonds under the contract. See Id. The key question in determining the sufficiency of a bid guarantee is whether the government will be able to enforce it. Id. Where the enforceability of the bid guarantee is uncertain, it 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. Kentucky Bridge and Dam, Inc., B-235806, July 17, 1989, 89-2 CPD ¶ 56.

Here, the agency concluded that the protester's bid was nonresponsive because a bid guarantee which expired 5 days after the expiration of bid acceptance period was not sufficient to ensure that the agency could exercise its rights if the bidder failed to furnish the required bonds. While the protester contends that, as a practical matter, it made prior arrangements to supply the necessary bonds well in advance of the expiration of its letter of credit, the determination as to whether a bid is responsive must be based solely on the bid documents themselves as they appear at the time of bid opening. Haz-Tad, Inc., et al., 68 Comp. Gen. 92 (1988), 88-2 CPD ¶ 486. Post-bid opening explanations are irrelevant. See Id. Here, on the face of Kentucky Bridge and Dam's bid guarantee, there was a lapse in time between the expiration of the letter of credit and the deadline for furnishing the bonds, during which the

agency would have no way of enforcing the expired letter of credit. The post-bid opening statement by Kentucky Bridge and Dam that, in fact, it would have furnished the required bonds before the expiration of its bid guarantee does not cure this defect. Accordingly, Kentucky Bridge and Dam's bid was properly rejected by the Navy.

Kentucky Bridge and Dam also argues that the rejection of its bid based on the defective letter of credit is a matter of responsibility that can be corrected after bid opening, rather than responsiveness. However, we have consistently held that the enforceability of a letter of credit (whether a bidder has failed to furnish a bid guarantee in accordance with the solicitation's terms) is a matter of responsiveness and that an erroneously prepared bid guarantee is nonresponsive and may not be corrected after bid opening. See Kentucky Bridge and Dam, Inc., B-235806, supra. Accordingly, we find that the agency properly determined that the enforceability of the letter of credit was a matter of responsiveness.

Since we have no basis to conclude that our previous decision contained any errors of law or fact, we deny the request for reconsideration.


James F. Hinchman
General Counsel