

143786



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: The GR Group, Inc.
File: B-242570
Date: April 29, 1991

Jeffrey L. Michelman, Esq., Popkin and Stern, for the protester.
Lester Edelman, Esq., Department of the Army, for the agency.
Aldo A. Benejam, Esq., Ralph O. White, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where applicable federal law exists, the General Accounting Office will not look to state law to determine the validity of a bid guarantee submitted for a federal procurement.
2. Agency properly rejected bid as nonresponsive where bidder furnished as its bid guarantee a letter from a local bank stating that bidder had deposited a U.S. Treasury bill; that a notation had been placed on the bill indicating that it had been pledged in favor of the contracting agency; and that the bill would be held until the agency released its security interest, but bidder did not provide a power of attorney and an agreement authorizing the sale of the security if bidder defaulted, as required by applicable regulations.

DECISION

The GR Group, Inc. protests the rejection of its bid, and the award of a contract to Basic Marine, Inc., under invitation for bids (IFB) No. DACW61-90-B-0091, issued by the United States Army Corps of Engineers, Philadelphia District, for the planning, engineering and construction of 50 pontoon (deck cargo) barges. The Army rejected the protester's bid as nonresponsive because The GR Group failed to submit with its bid a bid guarantee in the proper form and amount.

We deny the protest.

BACKGROUND

The Army issued the IFB on August 3, 1990. Paragraph I.2 of the IFB requires each bidder to provide a bid guarantee in the amount of 20 percent of the bid price or \$3 million, whichever is less. Paragraph I.2 also requires the submission of a bid bond executed on a Standard Form (SF) 24, or some other acceptable form of security in accordance with Federal Acquisition Regulation (FAR) § 52.228-1, the standard "Bid Guarantee" clause. The IFB cautioned bidders that failure to furnish a bid guarantee in the proper form and amount may be cause for rejection of the bid.

The Army received 11 bids by the August 30 bid opening date. The GR Group submitted the apparent low bid (\$1,629,745), while Basic Marine's bid (\$1,631,000) was second low. Appended to its bid, in response to the requirement for a bid guarantee, The GR Group provided an August 29 letter from the Commerce Bank of St. Louis addressed to the contracting officer, which states:

"Please be advised that The GR Group, Inc. has on deposit with Commerce Bank of St. Louis U.S. Treasury Bill Cusip #912794WH3 in the face amount of \$400,000, maturing May 9, 1991, and that in lieu of the Bid Bond required by the [IFB], a notation has been placed on the Treasury Bill indicating that it has been pledged in favor of the U.S. Army Engineer District, Philadelphia. This Treasury Bill will be held until substitution of security is made or the security interest is formally released by your agency."

The letter is signed by an officer of the bank. The GR Group submitted no other document with its bid regarding the bid guarantee requirement.

The Army determined that The GR Group failed to furnish an acceptable bid guarantee because it did not include a power of attorney and an agreement authorizing the sale of the Treasury bill if The GR Group defaulted, as required by applicable regulations.^{1/} By letter dated December 20, the contracting officer rejected The GR Group's bid as nonresponsive, and awarded the contract to Basic Marine. This protest followed.

^{1/} Default in this context refers to a failure to execute the necessary post-award contractual documents and furnish required payment and performance bonds. See FAR § 52.228-1(c).

DISCUSSION

The GR Group states that under Article 9 of the Uniform Commercial Code (U.C.C.), as adopted in Missouri (where the bank is located), its pledge alone provides the government with the same protection in all material respects as would a power of attorney and an agreement authorizing the sale of the security. The protester thus argues that the bank's letter appended to its bid pledging a U.S. Treasury note as security is a "firm commitment" and an acceptable bid guarantee.

Applicable law

As a preliminary matter, we disagree with The GR Group's contention that Missouri law governing pledges is controlling here. The validity and construction of contracts of the United States and their consequences on the rights and obligations of the parties present questions of federal law not controlled by the law of any state. Nationwide Roofing and Sheet Metal, Inc., 64 Comp. Gen. 474 (1985), 85-1 CPD ¶ 454. Although The GR Group correctly states that our Office has had occasion to apply general U.C.C. principles in our consideration of protests concerning the rejection of bids accompanied by various forms of insufficient bid guarantees,^{2/} we look to state law for guidance only in the absence of controlling federal law. Pete Vicari Gen. Contractor, Inc., B-236926, Jan. 23, 1990, 69 Comp. Gen. 191, 90-1 CPD ¶ 92; Nationwide Roofing and Sheet Metal, Inc., 64 Comp. Gen. 474, supra. Here, the FAR, the Code of Federal Regulations, and prior decisions of our Office provide adequate legal bases for our resolution of The GR Group's protest.

In addition, public policy supports the dominance of federal law in this regard. Agencies generally must be able to ascertain the adequacy of a bid guarantee solely from the documents submitted at bid opening. A&A Roofing Co., Inc., B-219645, Oct. 25, 1985, 85-2 CPD ¶ 463. As a result, uniform federal regulations exist to ascertain the sufficiency of bid guarantees, and to assist in determining whether bidders have adequately promised to surrender the assets that form the basis for the guarantee in the event the bidder fails to execute the necessary post-award contractual documents and furnish required payment and performance bonds, as required by FAR § 52.228-1(c). Ignoring these uniform regulations to require that agencies instead attempt to determine whether bidders have furnished adequate bid guarantees under the laws of an individual state would detract from the agencies'

^{2/} See, e.g., Bailey Enters., 66 Comp. Gen. 324 (1987), 87-1 CPD ¶ 265.

ability to promptly and definitively determine the adequacy of bid guarantees.

Bid guarantee requirement

A "bid guarantee" is a form of security submitted to assure the government that a successful bidder will not withdraw its bid within the period specified for acceptance and, if required, will execute a written contract and furnish performance and payment bonds. See FAR § 28.001. The purpose of a bid guarantee is to secure the liability to the government for excess procurement costs in the event the successful bidder defaults by failing to execute the necessary contractual documents or to furnish the required payment and performance bonds. See FAR § 52.228-1(c); Imperial Maint., Inc., B-224257, Jan. 8, 1987, 87-1 CPD ¶ 34. The key issue in determining the sufficiency of a bid guarantee is whether the government will be able to enforce it. Id. When the commitment to be bound is not clear, the guarantee properly may be regarded as defective, and the bid rejected as nonresponsive. See, e.g., BKS Constr. Co., 66 Comp. Gen. 492 (1987), 87-1 CPD ¶ 558, and cases cited therein.

The GR Group argues that the bank's letter appended to its bid pledging a U.S. Treasury bill as security should have been accepted by the contracting officer as a valid bid guarantee. According to The GR Group, the pledge of the Treasury note constitutes a "firm commitment" on its part, and such pledges are recognized as acceptable assets under FAR § 28.203-1, applicable to security interests provided by individual sureties. In addition, The GR Group asserts that contracting officers are authorized by FAR § 28.203-2 to accept from individual sureties pledged U.S. government securities on deposit with a bank to satisfy underlying bond obligations. The GR Group argues that since the bank's letter specifically states that the Treasury bill is on deposit, and since the letter manifests the bank's compliance with all of the essential requirements of FAR § 28.203-2(b)(2), the Army improperly rejected The GR Group's bid as nonresponsive.

FAR § 52.228-1(b), included in the IFB at paragraph I.40, specifically authorizes bidders to choose among several types of guarantees, so long as the guarantee is in the form of a "firm commitment, such as a bid bond, postal money order, certified check, irrevocable letter of credit, or, under Treasury Department regulations, certain bonds or notes of the United States." Thus, a Treasury bill is an acceptable form of a bid guarantee; however, contrary to the protester's contention, bidders choosing this form of bid guarantee must comply with Treasury Department regulations, as stated by the FAR clause on its face.

The Treasury regulations controlling the use of Treasury bills submitted as security in lieu of a surety or sureties on penal bonds are found in Treasury Department Circular No. 154, July 1, 1978, codified at 31 C.F.R. part 225 (1990). In particular, 31 C.F.R. § 225.2 states, in pertinent part:

"Any individual, partnership, or corporation required . . . to furnish any recognizance stipulation, bond, guaranty, or undertaking (hereinafter called penal bond), with surety or sureties, may, in lieu of such surety or sureties, deposit as security with the [contracting officer] United States . . . Treasury notes . . . together with an irrevocable power of attorney and agreement in the form prescribed, authorizing the [contracting officer] to collect or sell, assign and transfer such . . . notes so deposited in case of any default in the performance of any of the conditions or stipulations of such penal bond." (Emphasis added.)

Since The GR Group, as permitted by FAR § 52.228-1(b), opted to furnish a U.S. Treasury bill as its bid guarantee, it was required by 31 C.F.R. § 225.2 to also furnish a duly executed power of attorney and an agreement authorizing the sale of the security. Despite the explicit instructions in the Treasury regulations that the power of attorney and agreement must be irrevocable, 31 C.F.R. § 225.2, and prescribing the particular forms of the required documents, The GR Group failed to comply with these regulations.^{3/} Having failed to submit the appropriate power of attorney and agreement, the Army properly found that The GR Group's bid guarantee was defective, requiring rejection of the bid as nonresponsive.^{4/}

^{3/} The prescribed forms for the power of attorney and agreement, and for Form F, required by 31 C.F.R. § 225.16 and entitled, "Form Of Penal Bond For Execution By Individuals, Partnerships, Or Corporations Where Eligible Securities Are Accepted As Security In Lieu Of Surety Or Sureties," may be obtained from the Treasury Department. See 31 C.F.R. part 225, p. 62, n. 1.

^{4/} In view of our conclusion that FAR § 52.228-1(b) required The GR Group to comply with the Treasury Department regulations requiring the submission of a power of attorney and an agreement authorizing the sale of the security, and that The GR Group's failure to do so rendered its bid nonresponsive, we need not address the Army's contentions that the bid was also nonresponsive for The GR Group's failure to submit an SF 24 with its bid, or that FAR § 28.204-1 (which
(continued...)

Finally, we note that The GR Group implies that its bid guarantee is acceptable because it conforms to the Treasury Department's requirements for pledges of book-entry Treasury securities.^{5/} In support of its position, The GR Group states that it instructed the Commerce Bank of St. Louis "to enter a notation on The GR Group's book account [indicating] that the Treasury bill had been pledged" in favor of the Army; that the bank "entered a notation on The GR Group's book entry account," as evidenced by the bank's letter; and that a pledge of a Treasury bill in "book entry form" is a "readily marketable asset" which entitles the government to sell or dispose of the asset to enforce the bidder's obligation. In addition, The GR Group explains that in an October 2, 1990, letter responding to questions raised by the agency concerning The GR Group's bid guarantee, an officer of the bank stated that perfection of the Army's security interest is covered by the "[C.F.R.] as it applies to book-entry securities."^{6/} The October 2 letter does not indicate, however, that the procedures prescribed in the Treasury Department regulations concerning a pledge of book-entry securities were followed with respect to The GR Group's bid guarantee; nor does the record support such a conclusion.

The Treasury regulations permitting the use of Treasury notes as security interests authorize the use of book-entry Treasury securities for Treasury bonds, notes, certificates of indebtedness, or bills deposited with a Federal Reserve bank,

4/ (...continued)
also requires a power of attorney and an agreement authorizing the sale of the security) is applicable to The GR Group's bid guarantee. Likewise, we need not consider The GR Group's contention that the bank's letter manifested the bank's compliance with the essential requirements of FAR § 28.203-2(b)(2), applicable to individual sureties, and that the provisions applicable to security interests provided by individual sureties should extend to bid guarantees provided directly by the bidder in lieu of a surety.

5/ Book-entry Treasury security means a Treasury bond, note, certificate of indebtedness, or bill issued in the form of an entry made as prescribed in 31 C.F.R. part 306, subpart O, on the records of a Federal Reserve Bank. See 31 C.F.R. § 306.115(d).

6/ We presume this reference is to the above-described Treasury regulations at 31 C.F.R. part 306, subpart O.

in accordance with 31 C.F.R. part 306, subpart O. 31 C.F.R. § 225.22. Under subpart O, 31 C.F.R. § 306.118(a) states;

"A . . . pledge of book-entry Treasury securities to a Reserve bank (in its individual capacity or as fiscal agent of the United States), or to the United States . . . is effected and perfected . . . by a Reserve bank making an appropriate entry in its records of the securities . . . pledged. The making of such an entry in the records of a Reserve bank shall:

(1) Have the effect of a delivery in bearer form of definitive Treasury securities; (2) have the effect of a taking of delivery by the . . . pledgee; (3) constitute the . . . pledgee a holder; and (4) if a pledge, effect a perfected security interest therein in favor of the pledgee. . . ."


Thus, the regulations require that Treasury notes used as security under this provision be deposited with a Federal Reserve bank, and that the Reserve bank make the appropriate entries in its books. See 31 C.F.R. § 306.117. The GR Group provided no evidence, however, that the Treasury bill was deposited with a Federal Reserve bank, or that a Federal Reserve bank made the appropriate entries or was even involved in the transaction here. Indeed, the bank's letter indicates that the Treasury bill was on deposit with the Commerce Bank of St. Louis, not a Federal Reserve bank, and that the entry indicating that the Treasury bill was pledged in favor of the Army was made by Commerce Bank on its books of The GR Group's account, not by a Federal Reserve bank as required by 31 C.F.R. § 306.118. Therefore, despite the Army's mistaken assumption that Commerce Bank's notation effected delivery of the Treasury bill and that The GR Group's bid guarantee was unacceptable only because the protester failed to provide a power of attorney and an agreement with its bid, we find that the bank's notation was insufficient to effect delivery of the Treasury bill to the contracting agency. In sum, The GR Group did not, in any way, comply with the Treasury Department regulations controlling pledges of book-entry Treasury securities.

CONCLUSION

The GR Group failed to submit a power of attorney and an agreement with its bid authorizing the sale of the Treasury note in contravention of applicable Treasury Department regulations. In the absence of a duly executed power of attorney and agreement, the bank's letter alone did not

provide the government with direct, irrevocable, and immediate access to the Treasury note, The GR Group also failed to meet its bid guarantee requirement with the pledge of a book-entry Treasury security. Thus, the Army reasonably concluded that it might not be able to enforce The GR Group's bid guarantee in the event the firm defaulted, and properly rejected The GR Group's bid as nonresponsive.

The protest is denied.


James F. Hinchman
General Counsel