



Decision

Matter of: Blanton Contractors, Inc.

File: B-260562

Date: June 27, 1995

John M. Rankin, Jr., Esq., Anderson and Rankin, for the protester.

Lester Edelman, Esq., Department of the Army, for the agency.

Jacqueline Maeder, Esq., and Paul Lieberman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly rejected protester's proposal which provided a contract guarantee in the form of an irrevocable letter of credit that restricted the government's right to draw upon the letter; agency is not obligated to accept a defective guarantee because it mistakenly did so previously, and is not required to reopen discussions to allow offeror to remedy defects in the guarantee furnished with its best and final offer.

DECISION

Blanton Contractors, Inc. protests the award of a contract to Tarter Contracting, Inc. under request for proposals (RFP) No. DACW62-94-R-0034, a total small business set-aside issued by the Department of the Army, U.S. Army Corps of Engineers, Nashville District, for operation and maintenance services at Lake Cumberland and Laurel River Lake projects, Kentucky. Blanton alleges that the agency improperly rejected its contract guarantee and that, as the offeror submitting the low-priced, acceptable proposal, it should have been awarded the contract.

We deny the protest.

The RFP required each offeror to submit with its offer a contract guarantee in the form of a firm commitment, such as a bid bond, irrevocable letter of credit, or other security as specified in Federal Acquisition Regulation (FAR) § 52.228-1, in an amount equal to 20 percent of the offered price or \$3,000,000, whichever was less.

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The RFP also provided that award would be made to the offeror whose proposal, conforming to the solicitation, was determined to be most advantageous to the government, cost or price and other factors considered.

Blanton submitted with its initial proposal a bid bond (standard form 24) executed by an individual surety with no supporting documentation. In discussions, Blanton was informed that its bid bond as submitted was unacceptable. The agency provided Blanton with a copy of FAR part 28 and recommended that Blanton review the FAR requirements concerning acceptable bid bonds.

Before best and final offers (BAFO) were due, and separate from its BAFO, Blanton submitted a re-executed bid bond with a list of money market accounts, certificates of deposits, bonds, and stocks available to secure the bid bond. The bid bond form and the list of cash available were signed by the individual surety. The agency reopened discussions and informed Blanton that the revised bid bond still did not meet the requirements of the FAR and could not be accepted.

With its BAFO, Blanton submitted an "Irrevocable Letter of Credit," issued by a bank, which provided that it was "subject to the Uniform Customs and Practice for Documentary Credits (1983 revision), International Chamber of Commerce Publication No. 400." The Army found the letter of credit deficient because the Uniform Customs and Practice for Documentary Credits (UCP), to which the letter was subject, restricted the government's right to draw upon the letter.

Nonetheless, the contracting officer directed the evaluation panel to evaluate Blanton's proposal. Based on the evaluations, the Army determined that Tarter's proposal, which received the highest technical ranking and was second low in price, represented the most advantageous offer to the government and Tarter was awarded the contract on February 10, 1995. By letter dated February 15, Blanton was notified of the award and of the weaknesses in its proposal and informed that its letter of credit was unacceptable.

In its protest, Blanton does not dispute that its letter of credit was unacceptable; rather, Blanton argues that the contracting officer should either have accepted the defective guarantee because the agency had previously accepted a similar letter submitted with the same restrictive language by Tarter, or give Blanton an opportunity to cure the deficiency. Blanton also argues that the agency's cost/technical tradeoff was improper and that the Army should have awarded the contract to Blanton as the low-priced, acceptable offeror.

It is clear that Blanton's letter of credit was unacceptable. A properly drawn irrevocable letter of credit is a firm commitment to assure the government that a successful offeror will execute contractual documents and provide payment and performance bonds as required under the contract. Its purpose is to secure the bank's liability to the government for excess procurement costs in the event the offeror fails to honor its offer in these regards. The key question in determining the sufficiency of a contract guarantee (irrevocable letter of credit in this instance) is whether the government will be able to enforce it. Niles Janitor Serv. & Supply, Inc., B-246575.3, Mar. 3, 1992, 92-1 CPD ¶ 256. When the liability of the bank is not clear, the guarantee properly may be regarded as defective and the offer rejected. Id.

The enforceability of the bank's obligation under a letter of credit subject to the UCP is uncertain because of Article 19 of the UCP, which states that banks assume no liability or responsibility under a letter of credit which expires during an interruption of bank business due to acts of God, riots, civil commotions, insurrections, wars or any other causes beyond their control. Since this limitation could serve to cause the government to relinquish its right to enforce payment under the letter, the Army properly found the letter of credit defective. Id.

Blanton's contentions that the Army should accept its defective guarantee because it had previously done so or allow the protester to cure the deficiency through the conduct of additional discussions are without merit. Although the agency may have previously accepted identical letters of credit, an agency's past practice is not a basis for questioning its application of otherwise correct procurement practices. Id.; General Elec. Co., B-228191, Dec. 14, 1987, 87-2 CPD ¶ 585. To the extent that the protester believes that the Army should have reopened discussions with Blanton regarding its irrevocable letter of credit, submitted with its BAFO, there is no obligation to reopen discussions so that an offeror may remedy defects first introduced in a BAFO. Brooks Towers, Inc., B-255944.2, Apr. 28, 1994, 94-1 CPD ¶ 289.

Because Blanton's offer was properly rejected because of its defective guarantee, Blanton is not an interested party to advance its argument that the agency's cost/technical tradeoff was improper. A party is not interested to maintain a protest if it would not be in line for award if the protest were sustained. Bid Protest Regulations, 4 C.F.R. §§ 21.0(a) and 21.1(a) (1995). Blanton would not be eligible for award even if its remaining protest ground were sustained. We dismiss this protest issue. Brooks Towers, Inc., supra.

The protest is denied.

\s\ Michael R. Golden
for Robert P. Murphy
General Counsel