

McArthur



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Mycon Construction Co. Inc.
File: B-231412
Date: July 27, 1988

DIGEST

Where letter of credit submitted as a bid guarantee is conditioned upon assignment of the contract to a commercial banker in the event of default, thereby limiting the government's rights under the standard Default clause, agency properly rejected the bid as nonresponsive.

DECISION

Mycon Construction Inc. protests the rejection of its low bid under invitation for bids (IFB) No. DACA63-88-B-0097, issued by the Corps of Engineers, Fort Worth District. The contracting officer rejected the protester's bid because of defects in the letter of credit submitted with the protester's bid as a bid guarantee.

We deny the protest.

On March 2, 1988, the agency issued the solicitation as a 100 percent set-aside for small disadvantaged business concerns for replacement of water mains, fire hydrants and post indicator valves, and replacement of barricades at the Louisiana Army Ammunition Plant in Shreveport, Louisiana. The IFB required potential bidders to furnish a bid guarantee in the amount of 20 percent of the bid price or \$3,000,000, whichever was less. The IFB also contained Federal Acquisition Regulation (FAR), § 52.228-1, Bid Guarantee, allowing bidders to furnish a bid guarantee in the form of a firm commitment such as a bid bond, postal money order, certified check, cashier's check, or a irrevocable letter of credit. That provision also advised bidders that the failure to submit a bid guarantee in the proper form could cause rejection of a bid, and establish the government's right to terminate the contract for default if the successful bidder failed to execute payment and

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performance bonds within a specified time. The IFB also contained FAR § 52.249-10, Default, reserving for the government the right to complete work by contract or otherwise in the event of default.

The protester submitted with its bid an irrevocable letter of credit issued by the American Mortgage Corporation of Newport Beach, California. The letter was for \$1 million and stated that "strict adherence by the Beneficiary" to certain conditions was required. One of the conditions read, "Drafts must be preceded by the assignment of the contract for construction . . . duly executed by the Beneficiary hereby to American Mortgage Corporation." On April 22, the agency notified the protester that the contracting officer was rejecting Mycon's bid as nonresponsive because, among other things, the letter of credit was conditioned on the assignment of the contract to American Mortgage Corporation. This protest followed.

The question of responsiveness of a bid concerns whether a bidder has unequivocally offered to provide the requested items or services in total conformance with the requirements specified in the IFB. Free-Flow Packaging Corp., B-204482, Feb. 23, 1982, 82-1 CPD ¶ 162. Because all bidders must compete for advertised contracts on a common basis, no individual bidder can reserve rights to immunities from responsibility that are not extended to all bidders by the conditions and specifications advertised in the IFB. Id. Where a bidder qualifies its bid to protect itself or reserves rights which are inconsistent with a material portion of the IFB, the bid must be rejected as nonresponsive. Data Controls/North Inc., B-205726, June 21, 1982, 82-1 CPD ¶ 610, aff'd upon reconsideration, B-205726.2, Aug. 16, 1982, 82-2 CPD ¶ 131.

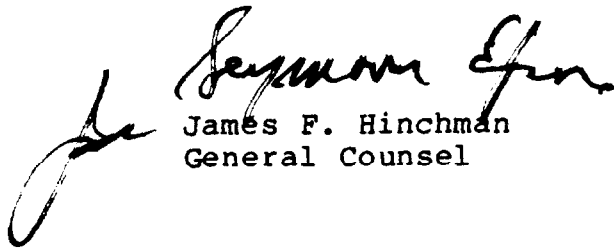
Here, the letter of credit submitted by the protester required the assignment of the defaulted contract to the surety who, according to the protester, would then comply with all contract terms, including the furnishing of payment and performance bonds. However, it follows that by requiring assignment of the contract to its surety, the protester also required the government to relinquish the right to complete the work in-house in accordance with the standard default clause. As stated above, that clause provides that, upon default, the government "may take over the work and compete it by contract or otherwise."

Under appropriate circumstances, the right to complete work in-house is potentially a valuable right that the government may invoke, charging any excess costs to the defaulted contractor. For example, the government may use in-house personnel to complete all or part of terminated construction

work and assess excess costs against the defaulted contractor, so long as it acts reasonably in doing so. Cf. Brent L. Sellick, ASBCA No. 21869, 78-1 BCA ¶ 13,510 (1978) (use of in-house public works crew not reasonable). Accordingly we think that the condition in the letter of credit, requiring assignment, limited the right of the government under the default clause and therefore rendered the bid nonresponsive.

Because we find that the protester's bid guarantee contained an unacceptable condition, and that the rejection of the protester's bid was proper, we need not address the protester's allegations concerning the other reasons for which the agency found the bid guarantee to be deficient. See BKS Construction Co., 66 Comp. Gen. 492, 87-1 CPD ¶ 558.

We deny the protest.



James F. Hinchman
General Counsel