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Proc II

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

[Protest of Bid Rejection as Nonresponsive]

FILE: B-200125

DATE: November 10, 1980

MATTER OF: Shockley Construction Co. DLG 05460

DIGEST:

Where letter of credit (LOC) submitted as bid guarantee contains language securing bidder's "performance and fulfillment of contract," LOC secures bidder's fulfillment of specific requirements under contract to execute necessary documents and provide performance, and payment bonds. Thus, LOC is legally sufficient as bid guarantee and bids need not have been rejected.

Shockley Construction Company (Shockley) protests the rejection as nonresponsive of its bids under invitation for bids (IFB) Nos. R8-4-80-17 and R8-4-80-18 issued by the United States Department of Agriculture, Forest Service, for road construction work in the Cherokee National Forest.

The Forest Service rejected Shockley's bids under both IFBs based upon its belief that the terms of Shockley's letters of credit offered as bid guarantees were legally insufficient. Awards have been made under both IFBs. For the following reasons, we believe that the Forest Service erred in its assessment of Shockley's bid guarantees.

A bid guarantee assures that a successful bidder will go forward with its contractual commitment to execute contract documents, if any, and provide required performance and payment bonds. Federal Procurement Regulations § 1-10.102.2 (1964 ed.). Here, each Forest Service IFB required that bid guarantees "be in the form of a firm commitment, such as a bid bond, postal money order, certified check, irrevocable letter

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of credit or, in accordance with Treasury Department regulations, certain bonds or notes of the United States." To satisfy this requirement, Shockley submitted a bank letter of credit (LOC) which stated, in pertinent part:

"* * * The Citizens Bank of Sneedville hereby offers an irrevocable letter of credit in the amount of * * *. Said letter of credit is pledged as security for performance and fulfillment of the contract * * * if awarded to Shockley Construction Company, Sneedville, Tennessee * * * this authorizes the Forest Service, USDA to draw sight drafts upon the Citizens Bank * * *."

In reviewing the bid guarantees, the Forest Service concluded that the language of the LOC would not afford the Government full and complete protection in the event that Shockley failed to execute required contract documents and deliver performance and payment bonds.

In support of this conclusion the agency states:

"the letter [LOC] actually makes no reference that it secures or provides the bid guarantee required by the Invitation for Bid. Rather, it provides that it secures the 'performance and fulfillment of the contract * * * if awarded.' When you also consider the use of the word 'offers' in the first sentence, it is our opinion that what it appears that the letter actually provides is the promise of a letter of credit securing performance of the contract once awarded. There is no doubt that normally when reference is made to 'performance' in a contract, we are concerned with the fulfillment of all the contractor's obligations under the contract in connection with the * * * specifications of the contract. We are not concerned with the preliminary tasks of executing contract documents or providing bonds. Therefore the letter provided by the Bank is at best ambiguous and possibly is in fact intended to be a letter of credit to secure performance and is not even a bid guarantee."

We disagree with the agency rationale because we believe the agency has defined contract "performance" too narrowly by limiting it only to performance of the work called for by the road construction specifications, thus excluding from the concept of contract performance compliance with all other contractual terms and conditions. In our view, requirements to execute additional documents (including Standard Form 23 "Construction Contract") and to deliver performance and payment bonds are performance requirements of a contract which would come into existence upon the Government's acceptance of a bid, this being the time when the parties' legal obligations to one another are set. Wilson & Hayes, Inc., B-197942, May 9, 1980, 80-1 CPD 336. Illustrative of the fact that a contract comes into existence upon Government bid acceptance and that execution of additional documents and delivery of additional bonds are performance requirements of an already existent contract, is that Standard Form 22, "Instructions to Bidders," warns that failure to comply with the abovementioned requirements could result in contract termination for default and that the bid guarantee "shall be available toward offsetting" the cost of reprocurement.

Since a contractor is required to comply with all terms and conditions of a contract (including provisions calling for the execution of necessary documents and the delivery of required performance and payment bonds) as well as the actual work specifications, such compliance with any contractual term, condition or specification is in our opinion contract performance.

Furthermore, we do not believe that the use of the term "offer" in the LOC in any way qualifies the bank's pledge to secure Shockley's actions. While the Forest Service construes the bank's "offer of an irrevocable letter of credit" as being merely a promise to enter into a future letter of credit, we believe it is clear that the bank is presenting to the Forest Service an irrevocable letter of credit, already in existence, so that the agency may act upon it if Shockley fails to fulfill the stated terms of the letter. It appears to us that any doubt as to the meaning of the term offer is resolved by the second paragraph of the LOC which "authorizes" the Forest Service to draw sight drafts on the bank.

The Forest Service has advised us that a significant amount of excavation and road construction work has begun under both construction contracts. Because of this, we do not believe it would be in the best interest of the Government to terminate those contracts and award new contracts to Shockley, since it appears that the costs involved in the termination process would far exceed the savings to be obtained in awarding the contracts to Shockley.

By letter of today, we are advising the Secretary of Agriculture of our findings in this decision so that a recurrence of this situation can be avoided in the future.

Harry R. Dan Cleave

For The Comptroller General
of the United States