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Bruce Krasker
Proc. I

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

FILE: B-187628 DATE: February 18, 1977

MATTER OF: Willard Company, Inc.

DIGEST:

1. Requirement for bid performance and payment bonds in IFB for small fiberglass boats does not unduly restrict competition where agency has advanced reasonable basis for imposition in accordance with ASPR § 10-104 (1976 ed.) relating to use of Government property and financial instability of the fiberglass segment of the small boat industry.

2. Economic instability of fiberglass segment of small boat industry is not sufficient basis to object to Navy policy to apply bonding requirement uniformly to boat industry as a whole.

3. Fact that one firm, or even a segment of an industry, cannot meet Government's requirements is not *per se* indicative that requirement unduly restricts competition.

The Willard Company, Inc. (Willard), protests that the bonding requirements of Naval Sea Systems Command (NAVSEA) invitations for bids (IFB) N00024-76-B-2172 and -2300 for various length fiberglass boats unduly restricts competition. Essentially, Willard maintains that the requirement for a 20-percent bid bond, 50-percent performance bond and applicable payment bond (depending upon the contract price) has created a *de facto* sole-source situation because only Uniflite, Inc. (Uniflite), can obtain the necessary bonding.

In support of its contention, Willard has submitted information which establishes that of seven competitive procurements issued by NAVSEA since November 1974, Uniflite was the successful contractor in all seven instances. On three instances, Uniflite was the only bidder. On the other four IFB's, the other bidders, including Willard, were nonresponsive for failing to submit the necessary bonds with their bids. Willard has also submitted information which indicates the difficulty it is encountering in trying to obtain the bonding as follows:

"[T]he basic problem is the large loss suffered by the insurance companies over the past few years due to major collapses in the construction industry and within the Real Estate Investment Trusts. As a result over half the insurance companies that used to provide bonds are no longer in that business. (As an additional item it should be stated that there has been a major reduction in the number of companies actively participating in the SBA guaranteed bonding program and neither of four remaining companies has a bonding capacity sufficient for this effort. You must remember that it is the size of the contract-- not the value of the bond that sets the dollar value.) Thus, a rule of thumb might be that your unencumbered assets must exceed your liabilities by at least three times the amount of the bond or you must have built precisely the same item in the past in order to qualify for the bond."

Further, Willard points out that the economic conditions of the fiberglass boat industry are such that firms not already possessing bonding will not be able to obtain it. Thus, the bonding requirements will continue to unduly restrict competition to Uniflite.

NAVSEA's position is that the bonding is necessary due to the economic instability of the fiberglass boat industry. NAVSEA notes that Armed Services Procurement Regulation (ASPR) § 10-104 (1976 ed.) permits the procuring activity to impose bonding requirements when amongst other considerations, the contracting officer determines that they are necessary to protect the interests of the United States. In implementation of that section, the Naval Ship Systems Command (a predecessor of NAVSEA), Contracts Directorate issued instruction 4315.1, on March 19, 1973, which stated in part:

"[B]id, performance and payment bonds will be required in contracting for the acquisition of vessels of 200 feet or less in length."

On August 30, 1974, NAVSEA affirmed this instruction as it applied to the NAVSEA Contracts Directorate, Shipbuilding and Overhaul Purchase Division. Further, it was stressed that the requirements were in addition to those stated in ASPR § 10-104 (1976 ed.).

NAVSEA states that the industry instability, as referenced in Willard's letter, reinforces the decision to impose the bonds to:

"* * * protect itself against defaulting financially-unstable contractors who fail to meet crucial contract delivery dates for urgent fleet requirements. It has been determined that the use of bonds is required to protect the Government's interest, since the terms of the contract provide for the contractors to have the use of Government material, property and funds."

As for efforts to expand competition in its small boat procurements, NAVSEA indicates that it has lifted small business restrictions on all fiberglass procurements. On occasion, NAVSEA states that it reduced the bonding amounts, as well as combining procurements to achieve a more economical production run. Also, fiberglass boat hulls have been made available to reduce the cost of securing molds.

Notwithstanding these efforts, NAVSEA notes that Uniflite possesses a competitive advantage over the rest of the industry since it owns more fiberglass boat molds that coincide with NAVSEA's needs. This enables Uniflite to keep its costs down. Also, Uniflite's commercial fiberglass boat business permits it to buy materials in bulk at lower costs.

NAVSEA further states that the bonding requirements are applicable to all small boat procurements--fiberglass, aluminum, wood. NAVSEA states that small shipbuilders for other materials have been able to obtain the necessary bonding. In this light NAVSEA resists Willard's attempt to have the fiberglass small boat building industry considered apart from the other types of boatbuilders. NAVSEA attributes the apparent lack of interest in the small boat building industry in competing for fiberglass boats to the necessity to specialize in one material, as well as to the competitive advantage generally recognized for Uniflite. Thus, NAVSEA maintains that the bonding requirements do not unduly restrict competition.

ASPR § 10-104.2(a) (1976 ed.) states that performance bonds may be required "* * * when the contracting officer determines the need therefor * * *." ASPR § 10-104.3 (1976 ed.) conditions the imposition of payment bonds upon whether a performance bond is required. Under this standard, the decision whether to impose bonding requirements is left to the discretion of the contracting officer. The standard our Office applies to discretionary determinations is generally whether they were arrived at in good faith with a reasonable basis. At the same time, it must be considered that full and free competition, consistent with the nature of the goods or services being procured, is the required norm. 10 U.S.C. § 2305 (1970). In conjunction with this, we also recognize that a degree of restrictions on competition is a necessary consequence of a bonding requirement, but it may be a necessary and proper method of securing receipt of the required goods or services to the Government. B-175458(2), June 23, 1972; 52 Comp. Gen. 640 (1973). We view bonding requirements as reasonably related to the purposes of procurement which are within the discretion of the procuring activity. Thorpe's Mowing, B-181154, July 17, 1974, 74-2 CPD 37.

In this case, it is germane that the bonding requirements apply equally to all small boat purchases, regardless of type of material. While Willard seeks to have the fiberglass segment of the small boat industry considered separately from the other components of the industry, we cannot say that NAVSEA's policy is unreasonable. The fact that one segment of an industry is less stable than others does not provide a sufficient basis for our Office to object to NAVSEA's policy of treating an entire industry uniformly. In this connection, the inability of a particular firm, or in this case possibly more than one firm, to meet the Government's requirement does not *per se* imply that the requirement unduly restricts competition.

ASPR § 10-104.2 (1976 ed.) provides examples of circumstances that justify the use of performance bonds. Subsection (a) concerns procurements where the contractor would have Government material, property or funds; subsection (b) permits the use for financial reasons. NAVSEA has stated that the contracts will contain provisions for the use of Government property. Further, NAVSEA maintains that the very reasons which preclude Willard from obtaining the bonds (i.e., its financial condition) are the same reasons that prompt NAVSEA to require the bonds. We think that NAVSEA has presented reasonable support for its decision with which we cannot legally object.

Consequently, the protest is denied.

R F Keller

Acting Comptroller General
of the United States