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J. Brennan

DECISION



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

FILE: B-191739

DATE: August 31, 1978

MATTER OF: CSA Reporting Corporation

DIGEST:

1. Absent either question of compliance with definitive responsibility criteria or allegation of fraud, affirmative responsibility determination is not for review by GAO.
2. Award to contractor who subsequently failed to furnish performance bond will not be questioned. However, recommendation is made that in future, performance bond requirements be strictly enforced to protect Government in event of default.

CSA Reporting Corporation (CSA) protests the award by the Interstate Commerce Commission (ICC) of a contract under Invitation for Bids (IFB) No. ICC-77-B-0012 for stenographic reporting and transcription services, to Metropolitan Reporting Services (Metropolitan). The protester argues that Metropolitan's failure to furnish a performance bond within 10 days of the award as mandated by paragraph J.6 of the IFB, should have resulted in the termination of that firm's contract and an award to CSA, the next lowest bidder. CSA further contends that the contracting officer's responsibility determination was either "nonexistent", as there was no preaward survey conducted, or "not made in accordance with the contract" since factors extant at the time of the award and immediately thereafter clearly evidenced Metropolitan's inability to perform. Moreover, it is the protester's position that, had the contracting officer required submission of the performance bond as per the contract, he would have become aware of Metropolitan's poor financial condition and inability to perform. In this regard, the protester notes that Metropolitan's contract was ultimately terminated for default.

Affirmative responsibility determinations involve subjective judgments which are largely within the discretion of the procuring officials who must suffer any difficulties resulting by reason of a contractor's inability to perform. The default termination in the instant case is an example of the difficulties which may result from an ill-considered responsibility determination. For this reason, we have declined to review such determinations absent either a question of compliance by a bidder with definitive guidelines or an allegation of fraud. Angler's Company, Ltd., B-190856, January 4, 1978, 78-1 CPD 3. Fraud is not alleged and the IFB does not contain any "definitive guidelines" or requirements with which a bidder would have to comply in order to be adjudged responsible.

Insofar as the performance bond is concerned, it appears that an attempt was made to obtain the required bond from Metropolitan but that the contract was terminated for default before any bond was submitted. (We also are informed that through administrative oversight, no bond was furnished under Metropolitan's prior contract with the ICC.) In situations such as this, where the solicitation provides that a performance bond is to be obtained subsequent to award, we have held that valid contract comes into existence at the time of award despite the failure of the awardee to submit the bond. Compliance with the bonding requirement then becomes the obligation of the contractor. See Hi-Grade Cleaning, B-190889, April 14, 1978, 78-1 CPD 287 and cases cited therein.

In view of the fact that a contractor's failure to furnish a performance bond is to be dealt with by the contracting officer as a matter of contract administration, and since Metropolitan's contract has been terminated for default because of unsatisfactory performance, there is no basis for our Office to question the validity of the award. However, we are recommending to the Chairman of the Interstate Commerce Commission that in the future, performance bond requirements be strictly enforced to protect the Government in the event of a default.

The protest is denied.

T. F. Kellen
Deputy Comptroller General
of the United States