

DECISION

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

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FILE: B-208148.2

DATE: December 6, 1982

MATTER OF: Cantu Services, Inc.

DIGEST:

1. Protest against requirements for performance and payment bonds in dining facility attendant services solicitation is without merit since contracting officer has discretion to determine whether need exists for bonding requirements. Record shows that bonds were considered necessary because contractor would have use of Government-owned property and because interruption in service would be detrimental to health, welfare, and morale of Air Force personnel. We conclude that these were reasonable bases for bonding requirements.
2. Protest that agency should waive requirements for performance and payment bonds with regard to protester is not for consideration on the merits, because the determination must be made after award and, therefore, is a matter of contract administration.

Cantu Services, Inc. (Cantu), protests under invitation for bids (IFB) No. F05600-82-B-0025 covering the requirement for full food services at Lowry Air Force Base, Colorado.

The invitation, a small business set-aside, was issued on June 10, 1982, and called for submission of bids by August 13. Cantu's protest was filed before the date set for bid opening. The protest centers on the IFB's requirement for performance and payment bonds which, Cantu argues, contravenes the applicable Defense Acquisition Regulation (DAR) (1976 ed.).

We find no merit to the protest.

Cantu argues that the solicitation requirement for performance and payment bonds is improper and represents a violation of section 10-104 of the DAR, which governs

the use of performance and payment bonds in other than construction contracts. Cantu also suggests that it would be appropriate for the contracting officer to waive the bonding requirement so as not to prejudice Cantu, which has not been able to obtain the bonds.

The protested bonding requirement is contained in section "L," paragraph 32, of the IFB, which, in pertinent part, states:

"A performance bond (Standard Form 25, Performance Bond) and a payment bond (DD Form 1673, DOD Payment Bond for Other than Construction Contracts) with good and sufficient surety shall be delivered to the contracting officer within 10 calendar days after receipt of the final award document by the contractor. The penal sum of the performance bond shall equal twenty-five percent (25%) of the contract price; the penal sum of the payment bond shall equal twenty-five (25%) percent of the contract price."

The Air Force determination in support of the requirement for performance and payment bonds states that the bonds are considered necessary because:

- " (i) Service is considered mission essential.
- " (ii) Negative consequences in health, welfare and morale should the contractor fail to perform.
- "(iii) No other viable alternatives would exist as the Government does not have the means to perform the service.
- " (iv) The Government would not be able to perform the required services with its own personnel.
- " (v) Service involves Government Furnished Property.

- " (vi) The Government would experience additional expense and hardship in the event the contractor should default."

Contracting officers have the discretion to determine whether a need exists under DAR §§ 10-104.2 and 10-104.3 for performance and payment bonds requirements in a particular procurement. 52 Comp. Gen. 640, 644 (1973). Although performance and payment bonds may in some circumstances result in a restriction of competition, they are nevertheless a necessary and proper means of securing to the Government fulfillment of a contractor's obligations under his contract. Thus, where the decision to require bonds is found to be reasonable and made in good faith, we will not disturb the agency's determination. See Triple "P" Services, Inc., B-204303, December 1, 1981, 81-2 CPD 436, and cases cited therein.

Our examination of the IFB shows that a considerable amount of Government-owned equipment will be used by the contractor selected to perform the required services. Use of Government-owned equipment is one of the justifications specifically enumerated in DAR § 10-104.2 as support for bonding requirements. Furthermore, the determination that contractor failure to perform would result in "[n]egative consequences in health, welfare and morale" is a reasonable justification for the bonding requirement. See Triple "P" Services, Inc., supra.

Regarding Cantu's argument that it is prejudiced by the bonding requirement, there is no evidence that adequate competition was not obtained. Even though the requirement does restrict competition somewhat, as stated above, the requirement is necessary and proper in certain circumstances. In view of the reasonableness of the determination, we find nothing improper in use of the bonding requirement.

Cantu's suggestion that the bonding requirement should be waived in its behalf is not for our consideration. Paragraph L32 states that the bonds will be provided by the contractor to the Air Force after award. Since the bonding requirement becomes the contractor's obligation under the contract, the determination whether to waive the requirement

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is a matter of contract administration and is not for review under our bid protest function. See Hi-Grade Cleaning, B-190889, April 14, 1978, 78-1 CPD 287.

Accordingly, Cantu's protest is denied.

for *Milton J. Rowland*
Comptroller General
of the United States

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