

DECISION

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

FILE: B-210680.2**DATE:** June 28, 1983**MATTER OF:** Wright's Auto Repair & Parts, Inc.**DIGEST:**

Protester fails to carry his burden of proving that contracting officials acted without a reasonable basis or in bad faith in requiring performance and payment bonds where the record reveals that the contracting officials determined in good faith that the bonds were necessary to protect the Government's interest in the considerable quantity of valuable Government property which will be provided to the contractor for use in performing the contract.

Wright's Auto Repair and Parts, Inc., protests the requirement for performance and payment bonds in invitation for bids No. N62477-82-B-8825, issued by the Department of the Navy's David W. Taylor Naval Ship Research and Development Center for the operation and maintenance of vehicles and equipment for rigging and load lifting at the Center's Annapolis and Bethesda, Maryland facilities. We deny the protest.

IFB -8825 required the low bidder to provide a performance bond in an amount equal to 100 percent of the contract price and a payment bond in an amount equal to 50 percent of the contract price, unless that price was more than \$1 million and less than \$5 million, in which case the amount of the payment bond need only equal 40 percent of the contract price. Prior to bid opening, Wright's protested the requirement of performance and payment bonds to our Office.

Wright's alleges that the bond requirement is being used here as a substitute for a determination of contractor responsibility in violation of Defense Acquisition Regulation (DAR) § 10-104.2 (1976 ed.). Wright's further argues that the bond requirement results in an unnecessary expense for the Government because the provisions in the

IFB for liquidated damages and for deductions from Government payments to the contractor for nonperformance or unsatisfactory performance, together with a proper determination of contractor responsibility, provide sufficient protection for the Government. Wright's also contends that any decision based upon the record presented by the Navy lacks a rational basis since the documents do not reveal any consideration of alternatives such as requiring a performance bond equal to less than 100 percent of the contract price.

The Navy denies that imposition of a bond requirement was improper. The Navy instead adopts the position of the contracting officials who approved the bond requirement and contends that the bond requirement was necessary in order to protect the Government's interest in the very large quantity of costly Government-owned tools, trucks, and weight- and materials-handling equipment which would be supplied to the contractor for use in performing the contract.

DAR § 10-104.2(a) provides that:

"(a) Performance bonds shall not be used as a substitute for determinations of contractor responsibility * * *. Subject to this general policy, performance bonds may be required in individual procurements when, consistent with the following criteria, the contracting officer determines the need therefor. Justification for any such requirement must be fully documented.

- (i) When the terms of the contract provide for the contractor to have the use of Government material, property or funds and further provide for the handling thereof by the contractor in a specified manner, a performance bond shall be required if needed to protect the Government's interest."

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As for payment bonds, DAR § 10-104.3 provides that, "If a performance bond is required a payment bond should also be required if it can be obtained at no additional cost."

Contracting officers have discretion to determine whether a need exists under DAR §§ 10-104.2 and 10-104.3 for performance and payment bonds in a particular procurement. Therefore, where the decision to require bonds is found to be reasonable and made in good faith, we will not disturb the agency's determination. Cantu Services, Inc., B-208317, November 2, 1982, 82-2 CPD 401. Further, the protester bears the burden of demonstrating that the decision to require the bonds was unreasonable or made in bad faith. See William P. Jolley, B-207982, November 9, 1982, 82-2 CPD 426.

Wright's has failed to show that the requirement of a performance bond is being used here as a substitute for a determination of contractor responsibility instead of as a measure to protect Government property.

Under this contract, the contractor would perform for two Navy installations:

"* * * the complete functions of operating and maintaining motor vehicles, materials handling equipment, weight handling equipment and construction and other equipment, performance of related transportation management functions, and complete rigging, load lifting, furniture and equipment moving services * * *."

In the performance of the contract, the contractor would use Government-furnished shop tools and vehicle repair equipment and rigging gear; maintain and operate a large fleet of vehicles; remove snow and ice from roads and sidewalks; maintain, test, repair and operate certain weight-handling equipment and rigging gear; and test certain lifting devices. A considerable amount of valuable Government equipment and vehicles, therefore, will be provided to the contractor for use in performing the contract. We have previously concluded that where a considerable amount of Government property will be provided for use by the contractor, then the contracting officials, under DAR § 10-104.2(a)(i), have a reasonable basis for

deciding to impose a performance bond requirement.
William P. Jolley, supra; Cantu Services, Inc., B-208316,
October 25, 1982, 82-2 CPD 366.

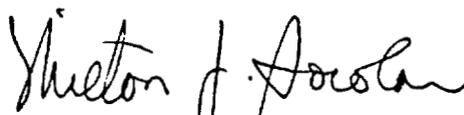
Wright's notes that the Government may make deductions from the contractor's invoices for work which is unsatisfactorily performed or not performed, plus impose liquidated damages in the amount of 10 percent for unsatisfactory work or 20 percent for work not performed, to compensate the Government for the additional administrative costs incurred. Wright's maintains that those provisions sufficiently protect the Government's interest so as to make the bond requirement unnecessary.

We disagree.

The schedule of deductions provides an incentive for the contractor to perform well by reducing the amount to be paid to the contractor on those occasions when it fails to perform or performs unsatisfactorily. It also establishes at the outset of the contract the amount by which payment is to be reduced for substandard service, rather than burden the administration of the contract with the necessity for resolving that issue each time a deficiency occurs. The purpose of the schedule of deductions, therefore, differs from that of the performance bond, which is designed to protect the Government in the event of a more serious failure of the contractor to perform.

Since the record clearly indicates that the contracting officials included the bonding requirement in the IFB in order to protect the Government's interest in the considerable, valuable Government property which would be provided for use by the contractor, we conclude that the Navy has satisfied the requirement of DAR § 10-104.2(a) that the justification for any bond requirement must be fully documented. Wright's has failed to demonstrate that contracting officials acted arbitrarily or in bad faith in imposing a performance bond requirement. Since we will therefore not question the requirement of a performance bond here, neither will we question the requirement of a payment bond. See A. R. & S. Enterprises, Inc., B-201924, July 7, 1981, 81-2 CPD 14.

The protest is denied.

for 
Comptroller General
of the United States