

DECISION



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

FILE: B-216049

DATE: November 14, 1984

MATTER OF: Renaissance Exchange, Inc.

DIGEST:

1. Protest that IFB requirement for performance and payment bonds is unduly restrictive is without merit since the solicitation evidences that in the performance of food service attendant work the awardee would be required to make extensive use of government equipment--one of the examples for bonding requirements enumerated in the Federal Acquisition Regulation. Moreover, the agency's requirement for continuous operations in its food service facilities is itself a reasonable basis for the bonding requirement.
2. Contention that requirement for performance bond was being used as a predetermination of responsibility is denied where requirement was documented as being for purpose of protecting government's property.
3. Protest that the requirement for nonworking supervisors for service attendants is unduly restrictive is denied where the contracting agency has established prima facie support for the requirement and the protester has failed to show that the requirement is clearly unreasonable.

Renaissance Exchange, Inc. (REI), protests the allegedly restrictive provisions of invitation for bids (IFB) No. F45613-84-B-0027, a small business set-aside, issued by Fairchild Air Force Base (Air Force), Washington, for food service attendants.

We deny the protest.

REI contends that the requirement for 100-percent performance and payment bonds does not comply with Federal Acquisition Regulation (FAR) § 28.103, 48 Fed. Reg. 42,102,

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42,288 (1983) (to be codified at 48 C.F.R. § 28.103), "Performance and payment bonds for other than construction contracts."

FAR § 28.103-2(a), 48 Fed. Reg. 42,288 (1983), states that performance bonds may be required when necessary to protect the government's interest. One of the listed examples of when a performance bond may be warranted is where government property is used by the contractor in performing the contract. FAR § 28.103-2(a)(1), 48 Fed. Reg. 42,288 (1983). REI argues that a bond is not necessary because the nature of the food service attendant contract involved bears no threat to the Air Force's equipment since the equipment remains in place throughout the life of the contract and is not used at the contractor's facility.

In analyzing Defense Acquisition Regulation (DAR) § 10-104.2, reprinted in 32 C.F.R. pts. 1-39 (1983), which preceded and was similar to the FAR provisions cited above, we stated that contracting agencies have the discretion to determine whether the need exists for a performance and payment bond requirement in a particular procurement. Triple "P" Services, Inc., B-204303, Dec. 1, 1981, 81-2 C.P.D. ¶ 436. Although a bond requirement may in some circumstances result in a restriction of competition, it is nevertheless a necessary and proper means of securing to the government fulfillment of a contractor's obligations under the contract. Triple "P" Services, Inc., B-204303, supra. 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. Cantu Services, Inc., B-208148.2, Dec. 6, 1982, 82-2 C.P.D. ¶ 507.

The Air Force determined that it was in the best interest of the government to require the performance and payment bonds in the present case because: (1) the government does not possess the manpower capability to immediately perform the required services should the contractor default, and continuous performance of the services is absolutely necessary, and (2) the solicitation provides for the contractor to use and be responsible for government property.

Our examination of the IFB shows that a considerable amount of government-owned equipment will be used by the contractor selected to perform this contract, one of the examples for bonding requirements specifically enumerated in

FAR § 28.103-2(a), 48 Fed. Reg. 42,288 (1983). See Triple "P" Services, Inc., B-204303, supra. Moreover, the determination that continuous operations are absolutely necessary is itself a reasonable basis for the bonding requirement. See Cantu Services, Inc., B-208148.2, supra; Triple "P" Services, Inc., B-204303, supra.

REI contends that the solicitation's requirement for performance and payment bonds constitutes an impermissible predetermination of responsibility because, even if a small business could be determined to be responsible by the Small Business Administration, it would be barred from competing for this contract if it could not obtain bonding. In Wright's Auto Repair & Parts, Inc., B-210680.2, June 28, 1983, 83-2 C.P.D. ¶ 34, we considered a similar contention that a requirement for a performance bond was being used as a predetermination of responsibility. However, we denied the contention because the requirement was documented as being for the purpose of protecting the government's property. Further, we have upheld the bond requirement for small business set-asides. See Executive-Suite Services, Inc., B-212416, May 29, 1984, 84-1 C.P.D. ¶ 577; Triple "P" Services, Inc., B-204303, supra.

REI argues also that the requirement that certain shifts for certain listed food service facilities have a nonworking contractor supervisor present is unduly restrictive because it exceeds the government's minimum needs. REI contends that working shiftleaders could adequately perform a supervisory function during the quieter hours of operation (5 p.m. to 9 a.m.) without any interruption in services, saving the government approximately \$10,000 per month.

The determination of the needs of the government and the best method of accommodating those needs are primarily the responsibility of the contracting agency. We will not question the contracting agency's determination absent a clear showing that it is unreasonable. Logistical Support, Inc., B-212218, B-212219, Feb. 23, 1984, 84-1 C.P.D. ¶ 231. Once an agency establishes prima facie support for its contention that the restrictions it imposes are needed to meet its minimum needs, the burden is on the protester to show that the requirements complained of are clearly unreasonable. Polymembrane Systems, Incorporated, B-213060, Mar. 27, 1984, 84-1 C.P.D. ¶ 354.

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The IFB, as originally issued, required that at each food service facility (buildings 1, 620, 1348 and 2080) a nonworking contractor supervisor be present during all hours that contract employees are working. Amendment 0003 changed the requirement for buildings 1 and 1348. The requirement was eliminated in its entirety for building 1 and for the midnight meal at building 1348. Before amending the solicitation, the Air Force covered the monetary savings that could accrue if the requirement were eliminated entirely. However, the Air Force determined that it would be in the best interest of the government to require a nonworking supervisor in the situations where it did not eliminate the requirement. According to the agency, when the supervisor was a working member of the shift, the supervisor could not effectively oversee the duties being performed by the mess attendants; if a problem developed, the supervisor had to be called away from the task being performed.

In response, REI argues that its experience as the incumbent shows that a full staff of nonworking supervisors would be unnecessary. REI states that it has performed the contract services in a satisfactory manner with only one nonworking supervisor who managed a staff of working shiftleaders. REI recognizes that occasional problems arose, but it claims that no significant impact to the food service program was experienced, except during the hours of 9 a.m. to 5 p.m. Therefore, REI argues that nonworking supervisors should be required (except in building 1) only during these hours.

However, the Air Force has established prima facie support for the requirement for nonworking supervisors and, in its response, REI has failed to show that the requirement is clearly unreasonable.

Milton J. Jordan

for
Comptroller General
of the United States