



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Security America Services, Inc.

File: B-224501

Date: October 24, 1986

DIGEST

1. General Accounting Office will not question a requirement for performance and payment bonds on a non-construction contract unless the decision to include the requirement is shown to be unreasonable or made in bad faith.
2. Intent of provision in invitation for guard services that sureties furnishing bonds for initial year are "bound . . . to include the option periods, if exercised" (option prices were evaluated) is unclear, since sureties are not parties to the contract and thus cannot actually be bound by it. Statement is not legally objectionable in the context of the procurement, however, since initial and option year bond requirements of the solicitation are separate and distinct, so that invitation does not contemplate contractor paying a first-year premium for option year for bonds, and government thus improperly reimbursing the firm in the initial-year price to protect only a contingent interest.

DECISION

Security America Services, Inc. (SAS), protests that the requirement for performance and payment bonds in invitation for bids (IFB) No. IFB/DLS-4-87, issued by the Immigration and Naturalization Service (INS) of the Department of Justice, is improper. We deny the protest.

The solicitation is for unarmed guard services at INS's Port Isabel Service Processing Center in Texas for a 1-year period, with options for 2 more years. Bids were opened on July 29, 1986, the day after SAS filed its protest; SAS did not bid, presumably because of its objection to the IFB's terms regarding bonding. Award is to be based on the low evaluated bid, including the option year prices.

The IFB requires, for the initial contract year, that the successful contractor furnish, before issuance of a notice to

proceed, a 100 percent performance bond and a 50 percent payment bond if the contract price is not more than \$1 million; 40 percent if the price is between \$1 and \$5 million. The IFB has a separate bonding provision for the option years, which provides that if the government exercises an option the contractor will have to furnish performance and payment bonds in the specified percentages of the option year price.

SAS objects to any requirement for performance and payment bonds. The firm points out that the Federal Acquisition Regulation (FAR), 48 C.F.R. § 28.103-1 (1985), provides that such bonds generally are not required for non-construction contracts. SAS further argues that while the regulation nevertheless does permit an agency to require bonds in non-construction situations "when necessary to protect the Government's interest," FAR, 48 C.F.R. § 28.103-2(a), our Office has endorsed such requirements only where government-furnished property was extensively involved in contract performance. The protester asserts that the services involved here are of a non-critical nature that do not require the use of government property, and bonds therefore are not appropriate.

INS responds that the primary function of the guard services, which are provided 24 hours per day, is the security and control of the entire, secured compound; the guards are charged with protecting government property and preventing the escape of incarcerated illegal aliens. The compound is made up of numerous buildings containing much government equipment to which the contractor will have unlimited access, and the contractor is responsible for damage to government property caused by his negligence. The agency asserts that guard services at its detention centers thus indeed are critical and cannot be suspended for even a short time. The agency advises that in fiscal year 1985 the contractors at Port Isabel and another processing center defaulted due to financial problems, and that INS's mission would have been harmed severely if the contracts had not included bonds.

We find no legal merit to the protest. In our decision in D. J. Findley, Inc., B-221096, Feb. 3, 1986, 86-1 C.P.D. ¶ 121, which also involved security guard services, we specifically rejected the proposition that our endorsement of bonding in non-construction situations depends on extensive use of government property in contract performance. We pointed out that, as stated above, the regulations authorize bonds anytime it is necessary to protect the government's interest; a contract where government property is to be used in performance is only one example of a situation in which a

bond requirement is needed to secure to the government the fulfillment of the contractor's obligations. FAR, 48 C.F.R. § 28.103-2(a)(1). We therefore stated that we would question a requirement for bonding on other than a construction contract only where the objecting firm establishes that the decision to include it was not reasonable or made in good faith. See also Galaxy Custodial Services, Inc., et al., 64 Comp. Gen. 593 (1985), 85-1 C.P.D. ¶ 658.

SAS does not argue that INS's decision to require bonds was made in bad faith. Moreover, we find nothing unreasonable in the agency's decision that bonds are needed to insure uninterrupted guard service in what, despite the protester's view to the contrary, we are persuaded by the agency's explanation is a critical performance situation. Accordingly, we deny this aspect of the protest.

SAS also protests a particular provision of the bond requirement as it applies to the option years. The language in issue is:

"Corporate sureties executing bonds for the initial period are bound to the contract to include the options periods, if exercised."

SAS contends that in order for a contractor to insure that the same surety used for the initial year is bound for the option years, the contractor must pay the surety a premium for all bonds in the first year. SAS argues that the requirement thus is improper in that its effect is to reflect in the contract's first-year price a government expense for an obligation that would not be incurred until the option years, and only if funds then are available and the options are exercised.

INS responds that the solicitation clearly only requires bonds for the option years if and when those options are exercised. Thus, the contractor simply will be required to furnish performance and payment bonds at the time the options are exercised at bid prices that reflect the premiums for those bonds; in INS's view, there is nothing wrong with such a requirement.

The purpose of the sentence to which SAS objects is not entirely clear. We do not see how the government, simply because it has a contract with the principal, can bind a particular surety to furnish option-period bonds, since the agency would have no practical recourse against the surety if the surety subsequently refused to furnish the bonds, there being no privity of contract between the parties. The only

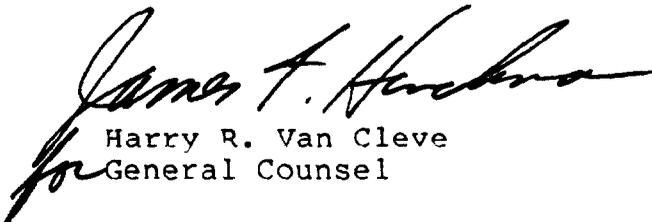
way the government could bind the surety, in our view, is by express agreement with the surety itself.

We would be inclined to agree with SAS that the provision in issue is improper if we also were to conclude that its actual effect was to require the contractor to present to the government at the contract's outset a 3-year surety commitment that reasonably necessitated a first-year payment of premiums for option-year bonds. In this respect, we have held that, as a general matter, the government does not desire to pay a contractor, in a price that includes a premium for a bond that covers an option period, for the protection of only a contingent interest. See Pacific Coast Utilities Service, Inc., B-209003.2, Jan. 20, 1983, 83-1 C.P.D. ¶ 73; see also Consolidated Technologies, Inc., B-215723, Dec. 7, 1984, 84-2 C.P.D. ¶ 639.

The only way to reach that conclusion, however, is to ignore the context in which the provision appears. As stated above, the IFB establishes discrete bonding provisions for the initial and each option year: option-year bonds are required to be submitted, in the specified amounts of the option year bid prices, only if and when the options are exercised. Thus, the invitation when read as a whole neither contemplates nor necessitates a first-year government expense for option-year bonds. Instead, it clearly is expected that the bond premium for an option year is reflected in that option-year price and thus is payable by the contractor and reimbursable by the government upon exercise, not before.

To the extent SAS believes it would need to pay its surety at the contract's outset for an option-year commitment even in the context of this procurement, we view that as a matter of the firm's business judgment, and not as a factor that necessarily establishes a solicitation impropriety. Further, as to the effect of the provision on the ultimate decision whether to exercise the option, which is a unilateral right of the government in any event, that involves a matter of contract administration, which is outside the scope of our bid protest function. See Interstate Equipment Sales, B-222213, Mar. 19, 1986, 86-1 C.P.D. ¶ 274. We therefore will not object to the solicitation on the basis argued by SAS.

The protest is denied.


Harry R. Van Cleve
for General Counsel