

Reback



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Professional Window and Housecleaning, Inc.

File: B-224187

Date: January 23, 1987

DIGEST

1. Protest that IFB requirement for bid, performance and payment bonds is unduly restrictive is without merit since it is within the agency's discretion whether to require bonding in a solicitation and General Accounting Office will not upset such a determination made reasonably and in good faith.
2. Agency's requirement for uninterrupted performance of custodial services is itself a reasonable basis for imposing bonding requirements in solicitation.
3. Protest that agency failed to respond to protest of bonding requirements sufficiently in advance of bid opening to permit protester to formulate its bid is denied where alleged delay does not prejudice protester where bonding requirement is proper and protester concedes it cannot secure required bonds.

DECISION

Professional Window and Housecleaning, Inc. (Professional), protests the bonding requirements of invitation for bids (IFB) No. DAKF15-86-B-0100 issued by the Department of the Army. The solicitation was for custodial and general housekeeping services at Fort Sheridan, Illinois. The protester argues that the contracting officer's decision to require bid, performance and payment bonds was arbitrary and unreasonable and unduly restricted competition by small businesses. In addition, the protester submits that the contracting officer failed to adequately and timely respond to two protests filed with the agency by the protester prior to bid opening. According to the protester, this failure on the part of the contracting officer resulted in the protester's ultimately being unable to submit a bid in a timely fashion.

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We deny the protest.

The solicitation was issued on June 17, 1986, and, as amended, set the bid opening date as September 9. It required each bidder to submit a bid bond in the amount of 20 percent of the first year bid price, and also required the low bidder to submit a payment bond and a performance bond in an amount equal to 50 percent of the first year bid price if the contract price was \$1,000,000 or less, or 40 percent of the first year bid price if the contract price was between \$1,000,000 and \$5,000,000.

These requirements were imposed pursuant to a memorandum dated June 2, in which the contracting officer stated that the bonding requirements were necessary to protect the government's interest in the overall health, safety and morale of the personnel at Fort Sheridan and to protect the government against financial loss in the event of contractor default. According to the memorandum, Fort Sheridan had a history of contractors underbidding these services with the result that in an attempt to recover the financial loss:

"contractors . . . have reduced their workforce, decreased supplies/equipment and ultimately the remaining workers were either cut on hours of work or were paid less than minimum wages in violation of the wage determination received from the Department of Labor."

As a result of the unsatisfactory performance or non-performance of these services, the contracting officer stated, the government had to buy its own supplies and workers' productivity suffered because they had to perform general custodial services in their work areas.

By letter dated August 22, Professional filed an agency-level protest in which it contended that the bonding requirements were not in accord with the Federal Acquisition Regulation (FAR), 48 C.F.R. Subpart 28.1 (1986); that they unduly restricted competition; and that they effectively excluded the protester as a bidder because it was unable to secure the required bid bond. The protester requested in its August 22 letter that the bonding requirements be removed from the solicitation and concluded with the "expectation" that the contracting officer give "prompt attention to [a] reply to this letter, within (10) ten working days" By letter dated September 3, the agency denied the protest, finding that the bonding requirements were proper on the grounds that performance by the contractor was thereby insured and that the government could sustain irreparable injury if the contractor failed to perform.

On September 8, Professional hand-carried a second protest to the agency requesting that the time for bid opening be extended on the grounds that the protester had not as of that date received a written reply to its original agency protest. In a telephone conversation the afternoon of the same day, confirmed by letter dated September 9, the contracting officer denied the second protest. Bids were opened as scheduled on September 9, and the protest was filed in our Office on September 22.

Professional argues first that the bonding requirements were unnecessary and that their inclusion in the solicitation was arbitrary and unreasonable on the part of the contracting officer. The protester maintains that the decision of the contracting officer to impose the performance bond requirement violated FAR, 48 C.F.R. § 28.103-2, because none of the situations identified therein as ones where a performance bond may be appropriate is present in this procurement. The protester also argues that the bonding requirements should have been deleted from the IFB because there was no Departmental approval of them as required by Department of the Army Acquisition Letter 86-20, dated June 20, 1986. Additionally, the protester argues that, even assuming that the contracting officer exercised his discretion properly under FAR, 48 C.F.R. § 28.103, he failed to properly document his rationale for the bonding requirements as the protester asserts is required by our holding in Steamco Janitorial Services, Inc., B-188330, Aug. 2, 1977, 77-2 C.P.D. ¶ 69. As a result, the protester argues that the bonding requirements of this solicitation have served to unduly restrict competition by small businesses and have prevented the protester from submitting a bid because it was unable to secure the required bid bond.

The agency responds that the contracting officer could reasonably decide here to require the bid, performance and payment bonds. The agency states that the general language of FAR, 48 C.F.R. § 28.103-2(a), permits a performance bond requirement even when one of the four enumerated circumstances is not present, so long as there exists the possibility that the government will suffer irreparable injury if the contractor defaults. In addition, the agency states, it was not required to obtain Departmental approval of the bond requirements pursuant to Acquisition Letter 86-20 since the letter was issued subsequent to the time when the solicitation was issued and does not require the amendment of solicitations already underway. The agency also states that the contracting officer's memorandum of June 2, and his denial of Professional's protest dated September 3, sufficiently document the rationale for the bonding requirements in this

solicitation. Finally, the agency argues that small business competition was not restricted by the bonding requirements because despite the requirements, 11 small business bids with bonds were received in response to the solicitation.

Performance and payment bond requirements, although they may result in a restriction of competition, are a necessary and proper means of securing to the government fulfillment of a contractor's obligations under his contract. D. J. Findley, Inc., B-221096, Feb. 3, 1986, 86-1 C.P.D. ¶ 121. Although as a general rule, in the case of nonconstruction contracts, agencies are admonished against the use of bonding requirements, see FAR, 48 C.F.R. § 28.103-1(a), the use of bonding requirements is permissible where the bonds are needed to protect the government's interest, whether or not the agency's rationale therefor comes within the four articulated reasons for a performance bond in the FAR, 48 C.F.R. § 28.103-2(a). See Renaissance Exchange, Inc., B-216049, Nov. 14, 1984, 84-2 C.P.D. ¶ 534. In reviewing a challenge to the imposition of a bonding requirement we look to see if the requirement is reasonable and imposed in good faith; the protester bears the burden of establishing unreasonableness or bad faith. See D. J. Findley, Inc., B-221096, *supra*; Galaxy Custodial Services, et al., 64 Comp. Gen. 593 (1985), 85-1 C.P.D. ¶ 658. Moreover, we have previously held that a finding on the part of the agency that continuous operations are absolutely necessary is itself a sufficient basis for requiring a performance bond. Galaxy Custodial Services, et al., 64 Comp. Gen. 593 (1985).

In its September 3 reply to Professional's first agency protest, the agency stated:

"Custodial services for other post locations require cleaning in areas containing sophisticated computer and telecommunications equipment The result of nonperformance or unacceptable performance in these locations would endanger the Government's mission by contributing to computer 'down-time,' causing loss of stored information or the loss of total communications capabilities."

In addition, the agency states that there has been a history of unsatisfactory results after award of contracts for custodial services at the installation. The agency states that contractors have in the past bid so low that the awardee does not possess the financial capability to perform the contract. The agency reports that these circumstances have resulted in a cost to the government in terms of purchasing its own supplies and in utilizing government personnel to cover deficiencies in contractor performance.

The protester responds that the requirements of the solicitation dealing with the computer area comprise but a small part of the contract's total dollar value which does not justify a bonding requirement. Additionally, the protester asserts that in all previous contracts between itself and the agency, it has performed in a wholly satisfactory manner.

In our view, although, as the protester points out, the communications area may be a small portion of the area to be cleaned, the protester has not established that the agency's concern for the area's cleanliness does not justify the bonding requirement. Moreover, although protester may well have performed its contracts with the Army in a satisfactory manner, this does not address the agency's concern for the unsatisfactory past performance of other contractors nor can the protester insure unequivocally that performance under the currently contemplated contract will be satisfactory. Accordingly, we are of the opinion that the protester has not established that the finding of the contracting officer quoted above was unreasonable or made in bad faith.

Having found that a performance bond is reasonably required in the instant case, we also note that a payment bond is proper where a performance bond "is required and a payment bond is in the government's interest." D. J. Findley, Inc., B-221096, supra; FAR, 48 C.F.R. § 28.103-3(a). A bid bond may be required where performance and payment bonds are required. FAR, 48 C.F.R. § 28.101(a).

We find without merit the protester's allegation that the bonding requirement should have been omitted from the solicitation after the June 20 Acquisition Letter was issued. Acquisition Letter 86-20 states "[a]n Army contracting officer desiring to require a performance bond in a CA [Commercial Activity] or service support solicitation . . . shall request approval, in advance of release of the solicitation" This language clearly indicates that the new directive was prospective in nature. Since the subject solicitation was released before the directive was issued, the solicitation did not need to conform to the requirements of the directive, and it did not have to be amended since the directive was silent with respect to procurements already underway.

With respect to Professional's allegation that the contracting officer failed to properly document his rationale for the bonding requirements we note that, contrary to protester's assertion, our decision in Steamco Janitorial Services, Inc., B-188330, supra, did not require that a contracting officer fully document his or her rationale for

imposing bonding requirements, but recognized the existence of such a requirement in the former Armed Services Procurement Regulation (ASPR) § 10-104.2(a) (1976 ed.), which does not apply to the present solicitation.

Finally, with respect to Professional's argument that the bonding requirements have served to unduly restrict competition from small businesses, as noted above, we have held that although a bond requirement, in some circumstances, may result in a restriction of competition, it nevertheless can be a necessary and proper means of securing to the government the fulfillment of the contractor's obligations under the contract in appropriate situations. D. J. Findley, Inc., B-221096, supra. Moreover, we are of the opinion that the submission of 11 bids, with bonds, from small businesses, is strongly indicative of adequate competition.

Professional's second ground of protest is that the contracting officer failed to adequately and timely respond to its two agency protests. Specifically, Professional argues that the contracting officer should have replied more expeditiously to its first protest of August 22 and that the relief requested in its second protest (i.e., an extension of the time for bid opening) was unreasonably denied. The protester argues that the effect of the contracting officer's action was to deny it an opportunity to bid.

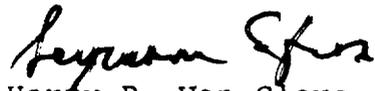
The agency, on the other hand, argues that the contracting officer was required only to respond to the protests prior to award of the contract, and was not required to extend the time for bid opening.^{1/}

We note that under FAR, 48 C.F.R. § 33.103(a), a contracting officer is only required to respond to protests to the agency prior to contract award. In any event, we fail to see how Professional was prejudiced by the agency's responses to its protests. The agency's opening of bids without responding to the agency-level protest meant that the Army was not deleting the bonding requirements and was not extending bid opening, thereby effectively denying the protest. This action on the part of the Army therefore constituted adverse agency action on the protest and under our Bid Protest Regulations, 4 C.F.R. § 21.0(e) (1986), Professional then had 10 working days to protest to us, which it did. Professional concedes it could not obtain the bonds

^{1/} The agency points out that it did, in fact, decide the first protest within the 10 working days which the protester had requested.

required by the IFB, and therefore, it could not submit a responsive bid. If we were to recommend resolicitation without the bond requirement, on the other hand, Professional would have the opportunity to bid. Of course, since we have found the bond requirement proper, Professional ultimately was not prejudiced by the agency's alleged delay in responding to its second protest.

The protest is denied.

for 
Harry R. Van Cleve
General Counsel