

Goddard - PL



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: PBSI Corporation

File: B-227897

Date: October 5, 1987

DIGEST

1. In a negotiated procurement, the contracting officer has broad powers to decide whether to cancel a solicitation and need only to establish a reasonable basis for the cancellation. Lack of funding for a procurement clearly provides a reasonable basis for cancellation.
2. Protest that bonding requirement in an invitation for bids is unduly restrictive is without merit since it is within agency's discretion to require bonding even in a small business set-aside and the General Accounting Office will not upset such a determination made reasonably and in good faith.
3. Agency's requirement for uninterrupted performance of custodial services is itself a reasonable basis for imposing bonding requirements in a solicitation.

DECISION

PBSI Corporation protests the cancellation of request for proposals (RFP) No. F05611-86-R-0076, and the subsequent use of an invitation for bids (IFB). PBSI also protests the requirement for bid, performance and payment bonds in IFB No. F05611-87-B-0093, issued by the U.S. Air Force Academy for janitorial services at the Academy.

The protest is denied.

PBSI contends that the Air Force is estopped from procuring the services under an IFB in view of the position the Air Force maintained in Servicemaster All Cleaning Services, Inc., B-223355, Aug. 22, 1986, 86-2 C.P.D. ¶ 216. Servicemaster involved a protest against an earlier solicitation for janitorial services at the Air Force

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Academy in which the protester there challenged the use of negotiated procedures and maintained that the solicitation should not have been changed from an IFB to an RFP. In that decision, we held that the Air Force was justified in using negotiated procedures because it saw a need for discussions due to past problems with formally advertised janitorial contracts. The Air Force had stated that the most recent contractor did not understand the requirements and was issued numerous contract discrepancy reports, two cure notices and one show cause letter. It was in an effort to avoid these problems that the Air Force decided to negotiate the procurement.

PBSI argues that in view of Servicemaster, supra, upholding the Air Force's use of an RFP, the Air Force erred in changing the solicitation format back to an IFB. In this connection, PBSI states that the tasks and site of the contract are still the same and the only change made has been a minor reduction in cleaning frequency.

The Air Force states that upon evaluation of best and final offers under the canceled RFP, the lowest acceptable offer was \$2,842,000 in excess of the available government funds. The Air Force states that the only alternative was to substantially change the performance work statement (PWS) to reduce the level of services so that a contract would be awarded within the budget. The PWS was rewritten to reflect decreased task frequencies and a new solicitation, using the IFB format, was issued. An IFB format was used because the Air Force found that the acceptable technical proposals received on the canceled RFP reflected a clear understanding of the work by the offerors and except for decreased task frequencies and the PWS change, the IFB requirements were basically the same as in the canceled RFP.

In a negotiated procurement, the contracting officer has broad powers to decide whether to cancel a solicitation and need only establish a reasonable basis for the cancellation. Lack of funding for a procurement clearly provides a reasonable basis for cancellation. James M. Carroll-- Reconsideration, B-221502.3, Mar. 24, 1986, 86-1 C.P.D. ¶ 290. While there was the possibility of amending the RFP to reduce the scope of work within the budgetary constraints, in view of the almost \$3 million reduction necessary and the opportunity for additional competition for the reduced requirements, we find it was appropriate for the Air Force to cancel the RFP.

With respect to the format for the subsequently issued solicitation, the Competition in Contracting Act of 1984, 10 U.S.C. § 2301 et seq. (Supp. III 1985), requires an agency to solicit sealed bids if:

- "(i) time permits the solicitation, submission, and evaluation of sealed bids;
- (ii) the award will be made on the basis of price and other price-related factors;
- (iii) it is not necessary to conduct discussions with the responding offerors about their bids; and
- (iv) there is a reasonable expectation of receiving more than one sealed bid. . . ." 10 U.S.C. § 2304(a)(2).

Here, all four conditions are now applicable. The Air Force no longer believes that there is a need to conduct discussions because the initial proposals submitted (without the conduct of negotiations) by the acceptable offerors under the RFP showed that the offerors understood the requirement, leading the Air Force to believe that offerors on the new competition, with its reduced requirements, would be able to adequately understand the PWS without negotiation. Accordingly, we have no basis to object to the use of the sealed bid format.

PBSI also protests that the requirement for bid, performance and payment bonds in this 100 percent small business set-aside is inappropriate as they limit competition and are being used as a substitute for the contracting officer's determination of responsibility. Further, PBSI states that the Armed Services Procurement Regulation (ASPR) prohibits the use of bonds for other than construction work.

The Air Force states that there is no bar to its requiring bonds and points out that the ASPR is no longer applicable. It further states that performance bonds are permissible to protect the government's interests and that its experience with janitorial contracts shows that requiring a bond is an effective way of ensuring continued performance on the contract. The Air Force reports that several contractors have admitted to it that they would not have completed their obligations under their contracts for janitorial services in the absence of performance and payment bonds. In this connection, the Air Force states that its need for uninterrupted janitorial services at the Academy is self evident. The Air Force points out that all past janitorial contracts have included bonding requirements and adequate competition has been obtained.

A bond requirement may, in some circumstances, result in a restriction of competition, but it nevertheless can be a

necessary and proper means of securing to the government fulfillment of the contractor's obligations under the contract in appropriate circumstances. Galaxy Custodial Services, Inc., et al., 64 Comp. Gen. 593 (1985), 85-1 C.P.D. ¶ 658. Although, as a general rule, in the case of nonconstruction contracts agencies are admonished against the use of bonding requirements, see the Federal Acquisition Regulation (FAR), 48 C.F.R. § 28.103-1(a) (1986), 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 comes within the four articulated reasons for a performance bond in the FAR, 48 C.F.R. § 28.103-2(a). Professional Window and Housecleaning, Inc., B-224187 Jan. 23, 1987, 87-1, C.P.D. ¶ 84. (We note that the FAR has superseded the ASPR. See T.L. James & Co., B-219443, Oct. 21, 1985, 85-2 C.P.D. ¶ 430.)

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. 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., supra.

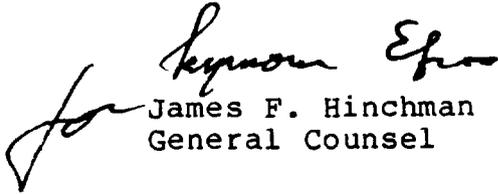
In addition, we have sanctioned the imposition of bonding requirement in small business set-asides. See Areawide Services, Inc., B-225253, Feb. 9, 1987, 87-1 C.P.D. ¶ 138.

In view of the Air Force's past contract experience and the chance of default with its janitorial service contractors and the fact the bonding requirement has been used in the past with no evidence of diminished competition, we find it reasonable that the Air Force would insist on a bonding requirement here. Moreover, PBSI has failed to show that bad faith motivated the Air Force's decision. See Areawide Services, Inc., supra.

Finally, with regard to PBSI's contention that the contracting officer is using the bonding requirement as a substitute for a determination of responsibility, the contracting officer asserts that she will make a responsibility determination separate and independent of the bonding

requirement. As we have previously noted, there is a difference between a pre-award survey and a performance bond, as the former does not offer the procuring agency any legal protection in case of default, whereas the latter does. See Areawide Services, Inc., supra.

The protest is denied.

James F. Hinchman
General Counsel