



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Intermodal Management, Ltd.

File: B-234108

Date: April 20, 1989

DIGEST

1. Performance bond requirement for medical center warehouse services contract is justifiably imposed to protect the government's interest where the contractor will be responsible for up to \$2 million worth of buildings, property and warehouse inventory including medical supplies, pharmaceuticals, equipment and subsistence and continuous operation of the warehouse is an essential service, which if not performed, could jeopardize patient care at medical center.

2. There is no requirement that agency make available to private contractors equipment currently used in an in-house operation. Under Office of Management and Budget Circular A-76, agencies are to determine whether to make available to contractors facilities, equipment and real property based on an informal cost-benefit analysis of what is most advantageous to the government.

DECISION

Intermodal Management, Ltd., protests provisions of invitation for bids (IFB) No. 657-4-89, issued by the Veterans Administration (VA) for warehouse services at the VA Medical Center in St. Louis, Missouri. The solicitation was issued pursuant to Office of Management and Budget (OMB) Circular No. A-76 to determine if contracting for the services would be more economical than continuing to have in-house personnel perform them. Intermodal contends, among other things, that certain provisions of the solicitation will cause expenses to firms bidding on the contract which will not be included in the government's bid so that there will not be a fair cost comparison.

We deny the protest.

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First, Intermodal argues that the performance bond required by the solicitation, 100 percent of the base year bid, is an unnecessary expense since the solicitation requires warehouse liability insurance, general liability insurance, automobile insurance and workman's compensation insurance which adequately protect the government. Further, Intermodal says that the purpose of the bond requirement is to increase the financial burden on bidders and restrain competition since this expense will not be included in the government's proposal. Intermodal also says that it has not encountered a performance bond requirement in solicitations for warehouse operations issued by other agencies or by the VA at other installations, even though those other solicitations involved equal buildings and materials.

Although a bond requirement may result in a restriction on competition, it nevertheless can be a necessary and proper means of securing to the government the fulfillment of the contractor's obligation under the contract in appropriate situations. D.J. Findley, Inc., B-221096, Feb. 3, 1986, 86-1 CPD ¶ 121. While generally contracting agencies should not require performance bonds for other than construction contracts, the Federal Acquisition Regulation (FAR) recognizes that there are situations in which bonds may be necessary for nonconstruction contracts in order to protect the government's interest. See FAR §§ 28.103-1 and 28.103-2(a).

There is no evidence in the record that the bonding requirement was imposed to restrict competition and we find that the VA's decision to impose the bonding requirement was reasonable. The use of government property by the contractor is one of the specifically enumerated justifications for requiring a performance bond for nonconstruction contracts. FAR § 28.103-2(a)(1). Here, the VA states that the performance bond is required to protect the government's interest in up to \$2 million worth of buildings, property and warehouse inventory, including medical supplies, pharmaceuticals, equipment and subsistence for which the contractor will be responsible.

Bonds also may be required where the continuous operation of critically needed services is absolutely necessary. Diversified Contract Services, Inc., B-233620, Feb. 21, 1989, 89-1 CPD ¶ 180. In this case, the agency states that the performance bond is required to ensure the operation of the warehouse, an essential service, which, if not performed, could jeopardize patient care at the medical center.

Intermodal further argues that other government warehousing activities, including some VA activities, have not required performance bonds even on solicitations that involved buildings and property equal in cost. This assertion does not establish the unreasonableness of the VA's imposition of the bonding requirement here, given our conclusion that it was justified to protect the government's interest in its property and to ensure continuity of critical services. See Govern Service, Inc., B-233365, Jan. 27, 1989, 68 Comp. Gen. _____, 89-1 CPD ¶ 92.

We also reject the protester's contention that the bonding requirement duplicates protection already afforded the government by insurance required by the solicitation. While performance bonds and insurance both are designed to protect the government's interest, they address different contingencies. Insurance protects the government against accidental losses which are incidental to performance; in contrast, performance bonds secure the contractor's obligation to perform and thus protect the government's interest against substantial failures in performance. SMC Information Systems, B-225815, June 1, 1987, 87-1 CPD ¶ 552.

Finally, the fact that the government does not have to include bonding costs in its in-house estimate does not affect the validity of the bonding requirement. While the government and offerors must compete on the same statement of work under an OMB Circular A-76 cost comparison, they may be subject to different legal requirements in obtaining or performing the contract that may cause commercial firms to suffer a cost disadvantage. Executive-Suite Services, Inc., B-212416, May 29, 1984, 84-1 CPD ¶ 577. Nothing limits the government's right to require bonds in cost-comparison situations to the same extent as authorized in other procurements. Id.

Intermodal also says that if the warehouse operation is contracted out, the VA will not provide fork lifts, pallet jacks, hand trucks and other government-furnished equipment, although this equipment will continue to be used if the contract is performed by government personnel. According to the protester, there is no reason to remove the equipment except to create more expense for commercial bidders. Further, Intermodal says that the solicitation should have included a list of current equipment and complains that the agency will provide such a list only if Intermodal pays the cost of collecting and forwarding the information under the Freedom of Information Act (FOIA) 5 U.S.C. § 552 (1982). Although the agency says that information concerning the equipment was available to all offerors at a pre-bid walk-thru of the warehouse facility

which Intermodal did not attend, the protester maintains that its failure to attend the walk-thru does not negate its right to the information. Intermodal requests that we direct the agency to provide the information under the FOIA.

In response, the VA says that when the solicitation's performance work statement was written, contracting officials decided that, because of funding constraints for replacement and maintenance, it would not be in the government's best interest to furnish warehouse equipment to a contractor. Also, the agency says that if the contractor provides such equipment, it will be clear that the contractor is responsible for maintenance, loss and replacement of such equipment. The agency also explains that, in accordance with OMB Circular A-76, Supplement, Part IV, Chapter 2, the costs of warehouse equipment will be included in the cost comparison and will be reflected in the government's bid as well as that of commercial offerors.

Under OMB Circular A-76, Supplement, Part I, Chapter 3, paragraph A(1), agencies are to determine whether to make available to contractors facilities, equipment and real property based on an informal cost-benefit analysis of what is most cost advantageous to the government. Therefore it was within the VA's discretion to decide not to make warehouse equipment available to contractors because of concerns for funding and responsibility for maintenance and replacement of equipment. Moreover, Intermodal will not be placed at a competitive disadvantage by the fact that equipment will not be furnished since the cost of equipment which is used to perform the work will be reflected in the government's bid as well as those of the commercial bidders.

With respect to Intermodal's request that it be provided under FOIA a list of the warehouse equipment currently in use, the VA says that this information was available during a pre-bid site walk-thru which Intermodal did not attend and that the information is still available but Intermodal would have to pay a small fee to reimburse the agency for the administrative expense of collecting and forwarding it. Although Intermodal complains that it should not be charged a fee for the equipment list and for other information it has requested under FOIA, our Office has no authority under FOIA to determine what information agencies must disclose under the act or the cost of such disclosure. See Colbar, Inc., B-227555.4, Feb. 19, 1988, 88-1 CPD ¶ 168.

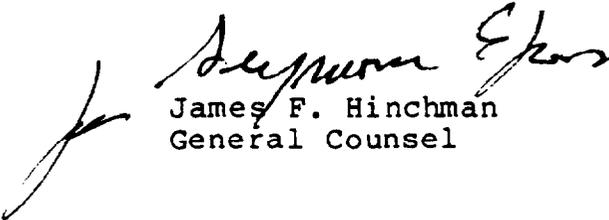
In its protest, Intermodal also argued that the solicitation called for removal of fire-extinguishers and security systems in order to increase offerors' cost and contended that the agency refused to provide information on current

fire extinguishers and security systems. Also, Intermodal noted that the Commerce Business Daily (CBD) notice for the solicitation indicated that 12 full-time employees were affected by this cost comparison while the agency's organizational chart for the warehouse operation shows a total of 18 employees.

After the protest was filed, the VA issued solicitation amendment Nos. 8 and 9 which, among other things, indicated that fire extinguishers and one security/fire alarm system would be provided as government-furnished equipment. amendment No. 8 also indicated that a second security system is currently provided and monitored by Wells Fargo and that the contractor would be responsible for providing and maintaining the same or a similar system. Also, amendment No. 9 corrected the discrepancy between the CBD notice and the organizational chart by indicating that the correct number of affected employees is 18.

Intermodal did not provide comments on these issues in response to the agency's report; it appears that the protester is satisfied with the corrective actions taken by the agency and we therefore need not consider the matter.

The protest is denied.



James F. Hinchman
General Counsel