Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Dohrman Machine Production, Inc.

File: B-236003

Date: October 12, 1989

DIGEST

1. Bonding requirements in an invitation for bids for equipment used for the replenishment of supplies and the refueling of ships at sea are not unduly restrictive of competition where the agency experienced a significant percentage of defaults in prior procurements resulting in severe consequences to the Navy mission.

2. Requirement for bid, performance and payment bonds can be waived for firms submitting bids through the Canadian Commercial Corporation (CCC) since the Canadian government, pursuant to a letter of agreement with the United States, guarantees all commitments, obligations, and covenants of the CCC in connection with any contract or order issued to the CCC by any contracting activity of the U.S. government.

DECISION

Dohrman Machine Production, Inc., protests requirements for bid, payment and performance bonds in Department of the Navy invitation for bids (IFB) No. N00029-89-B-4024 for winch, hydraulic and auxiliary equipment. Dohrman contends that the bonding requirements imposed by the solicitation are unauthorized under applicable regulations and unfair since these requirements were waived for the Canadian Commercial Corporation (CCC).

The protest is denied.

The solicitation, issued on April 18, 1989, is the second step of a two-step procurement. The solicitation provides for the procurement of underway replenishment (UNREP) equipment. UNREP equipment, consisting of items such as winches, anti-slack devices, ram tensioners and sliding blocks, is used for replenishment-at-sea and refueling-at-sea stations aboard naval ships. This equipment is used as part of a connected replenishment system which transfers solid cargo and bulk fuel to Naval ships while underway.

The Navy issued five amendments to the IFB, which extended the bid opening date and required domestic firms to furnish a bid guarantee and performance and payment bonds within 10 days after bid acceptance. Amendment No. 3 included an additional bid evaluation criterion applicable solely to the CCC: "Since the Canadian Commercial Corporation is not required to furnish a bid guarantee nor performance and payment bonds, any bid submitted by it shall be adjusted for evaluation purposes by the average of all United States firms' bid guarantee and bonding costs . . . ."

Dohrman protests the terms of the solicitation on two grounds: (1) that the bonding provisions were included without the appropriate finding required by Department of Defense Federal Acquisition Regulation Supplement (DFARS) § 228.103-2 (DAC 88-6); and (2) that the bonding requirements give an unfair and unlawful competitive advantage to firms submitting bids through the CCC, notwithstanding the quoted evaluation factor.

We have consistently held that while a bond requirement may, in some circumstances, result in a restriction of competition, it may nevertheless be a necessary and proper means of securing to the government fulfillment of the contractor's obligation under the contract. Aspen Cleaning Corp., B-233983, Mar. 21, 1989, 89-1 CPD ¶ 289. Although as a general rule, in the case of nonconstruction contracts, agencies are admonished against the use of bonds, Federal Acquisition Regulation (FAR) § 28.103-1(a) (FAC 84-30), the use of bonding is permissible where the bonds are needed to protect the government's interest, regardless of whether the agency's rationale comes within the four reasons for requiring a performance bond that are articulated in FAR § 28.103-2(a). Aspen Cleaning Corp., B-233983, supra. In this regard, we recognize that there are circumstances where bonds are needed to ensure performance, and this Office will not disturb a contracting officer's decision that bonds are needed in a nonconstruction situation if the decision is reasonable and made in good faith. Express Signs Int'l, B-225738, June 2, 1987, 87-1 CPD ¶ 562.

The Navy states that the decision to include in the solicitation requirements for a bid guarantee and performance and payment bonds is predicated upon its prior experience in procuring UNREP equipment. During the past 9 years, the agency reports, it has awarded 36 contracts for UNREP equipment to 15 small business contractors; none of the contracts contained bonding requirements. Five of those firms have sought protection under the bankruptcy laws prior to equipment delivery. Since installation of the

UNREP equipment is scheduled to occur when ships are available during shipyard overhauls, the delivery delays resulted in the failure to provide ships with this critical equipment during their scheduled availability, and necessitated their operation for at least 1-1/2 years with unreliable equipment until rescheduling could occur. In addition, the previous contracts provided for progress payments, as does this IFB, such that contractor default and bankruptcy exposed the Navy to significant financial losses since material and effort that was procured for the government's account was lost.

In view of the Navy's prior experience, and the consequences of default and late delivery, we are unable to conclude that the Navy's requirement for bonds is unreasonable. In addition, Dohrman neither has alleged nor shown that bad faith motivated the contracting officer's decision. Moreover, although the protester also questions whether the agency obtained the authorization needed to impose bonding requirements from the appropriate official required by DFARS § 228.103-2. The record shows that the appropriate official approved the bond requirements for this IFB in the acquisition plan.

Dohrman alternatively argues that the decision not to impose a bonding requirement on the CCC gives the CCC an unfair competitive advantage. The exemption of the CCC from the bonding requirements in this solicitation is the result of a Letter of Agreement between the United States and Canada wherein Canadian firms are encouraged to participate in United States Department of Defense procurements. DFARS subpart 225.71 (DAC 88-8). Pursuant to the agreement, the Canadian government established the CCC to act as the prime contractor on all U.S. government procurements in which Canadian firms bid. The CCC is merely a conduit through which Canadian firms submit bids on U.S. procurements. See generally B-168761, May 14, 1970. The agreement specifically states that "the Canadian government guarantees to the U.S. Government all commitments, obligations, and covenants of the [CCC] in connection with any contract or order issued to said Corporation by any contracting activity of the U.S. Government." DFARS § 225.7103. Consequently, the Navy waived the requirement for bonds for the CCC.

In regard to the role of the CCC and the Canadian government in Department of Defense procurements, we have stated that "[t]here is no question that nonperformance by the Canadian subcontractor would be followed by nonperformance by CCC and under terms of the international agreement the Canadian Government would be liable to the United States Government." B-168761, supra. Since the

purpose of performance bonds is to protect the government in case of a contractor default and since the Canadian government has already guaranteed performance or reparation in case of default, additional requirements of bonding would be merely duplicative protection for the United States government. Therefore, it was not improper to waive the requirement for bonds for firms bidding through the CCC.

In any event, since Dohrman is unable to obtain the bonds due to its own financial situation irrespective of any Canadian involvement, and since other domestic firms (including the low bidder) obtained suitable bonding, we find that Dohrman was not prejudiced by any competitive advantage that may have accrued to any Canadian firm by virtue of the waiver.

The protest is denied.

James F. Hinchman
General Counsel