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Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: E.L. Enterprises, Inc.

File: B-278766; B-278788; B-278789; B-278790

Date: February 23, 1998

Reggy Gray for the protester.

Terrence J. Tychan and Michael Colvin, Department of Health and Human Services, for the agency.

Charles W. Morrow, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Requirement for performance and payment bonds in solicitations for security guard services is reasonably supported where the agency had experience with contractors not paying employees that resulted in disruption of service and the bonds were reasonably deemed necessary to ensure uninterrupted service.

DECISION

E.L. Enterprises, Inc. protests the requirement for performance and payment bonds in request for proposals (RFP) Nos. S98-0003/CH, S98-0006/CH, S98-0011/CH, S98-0012/CH, total set asides for Indian-owned firms, issued by the Department of Health and Human Services, Indian Health Service (IHS), for security guard services.

We deny the protests.

The RFPs were issued by the IHS for security guard services at several medical facilities for a base period with 2 option years. RFP No. S98-0003/CH was for guard services at the Gallup Indian Medical Center, Gallup, New Mexico. RFP No. S98-0006/CH was for guard services at the Chinle Comprehensive Healthcare Facility, Chinle, Arizona and the Tsalle Health Center, Tsalle, Arizona. RFP No. S98-0011/CH was for guard services at the Winslow Indian Health Center, Winslow, Arizona. RFP No. S98-0012/CH was for guard services at the Tuba City Indian Medical Center, Tuba City, Arizona. Each RFP, as amended, required a performance bond in an amount equal to 20 percent of the contract price and a payment bond in an amount equal to 12 percent of the contract price.

E.L. Enterprises protests that the requirement for bonds is unnecessary because there is assertedly no risk to the government in a contract for security guard services, since payments are made to the contractor after performing the service.

E.L. Enterprises argues that the requirement unduly restricts competition by limiting Indian-owned companies from bidding on multiple solicitations.

Although as a general rule contracting agencies are admonished not to require performance and payment bonds in the case of nonconstruction contracts, Federal Acquisition Regulation (FAR) § 28.103-1(a) (June 1997), the regulations permit the use of bonding requirements where they are necessary to protect the government's interests. FAR §§ 28.103-2(a), 28.103-3(a) (June 1997). In reviewing a challenge to the imposition of a bonding requirement as unduly restrictive of competition, we look to see if the contracting officer's determination that bonding is necessary is reasonable and made in good faith. Northern Management Servs., Inc., B-261424, June 26, 1995, 95-1 CPD ¶ 291 at 2.

The IHS reports that, while it is true that contractors are paid after performing the service, the requirement for bonds was necessary for these solicitations in order to protect the government in the event that the contractor fails to properly make payments to its employees after being paid for the services. The agency reports that recent contracts for security services have been canceled or terminated for default because contractors have made delayed payments to their employees resulting in the employees walking off the site, leaving the agency with an unprotected facility. The IHS explains that the bonds were necessary to ensure uninterrupted security service and were in the government's best interest in order to minimize this risk. Further, the agency reports that it has received several offers in response to all of the RFPs.

E.L. Enterprises has not rebutted the agency's basis for imposing the requirement for bonds. We have recognized the reasonableness of imposing bonds in a contract for security guard service where the government is concerned about ensuring uninterrupted service because it has experienced interrupted service due to unpaid contractor employees in the past. See Certified Investigations, B-249812, Sept. 28, 1992, 92-2 CPD ¶ 224 at 3. Therefore, we find that the agency has reasonably demonstrated the necessity for the bonding requirements for these solicitations.

The protest is denied.

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