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DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548**

FILE: B-208316

DATE: October 25, 1982

MATTER OF: Cantu Services, Inc.

DIGEST:

1. Protest against requirements for performance and payment bonds in dining facility attendant services solicitation is without merit since contracting officer has discretion to determine whether need exists for bonding requirements. Record shows that bonds were considered necessary because contractor would have use of Government-owned property and because interruption in service would be detrimental to welfare of troops. We conclude that these were reasonable bases for bonding requirements.
2. Protest that agency should waive requirements for performance and payment bonds with regard to protester is not for consideration on merits, because such determination must be made after award and is, therefore, a matter of contract administration.

Cantu Services, Inc. (Cantu), protests against the requirement for performance and payment bonds in solicitation No. DABT01-82-B-0138-1, issued by the Department of the Army. The invitation for bids, a 100-percent small business set-aside, was issued on June 18, 1982, for dining facility attendant services at Fort Rucker, Alabama. Cantu filed its protest with our Office prior to bid opening, which took place on July 23. Cantu argues that the solicitation requirement for performance and payment bonds is improper and represents a violation of section 10-104 of the Defense Acquisition Regulation (DAR) (1976 ed.) which governs the use of performance and payment bonds in other than construction contracts. Cantu also suggests that it would be appropriate for the contracting officer to waive the bonding requirement so as not to prejudice Cantu which has not been able to obtain such bonds.

We conclude that the protest is without merit.

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The protested bonding requirement is contained in paragraph L32 of the invitation for bids which states, in pertinent part, that:

"(a) If the bid exceeds \$25,000, a performance and payment bond as described below shall be applicable.

"(b) Performance and Payment Bonds:
Within 15 days after the prescribed forms, SF 25 and SF 25A are presented to the bidder to whom award is made, the bidder shall execute said forms with good and sufficient surety or sureties acceptable to the Government and return to the Contracting Office.

"(c) The penal sum of the Performance and Payment Bonds each, shall equal fifty percent (50%) of the contract price.

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The contracting officer justified the bonds as being in the Government's best interest because:

"a. The terms of the contract provide for the contractor to have use of Government material and property and further provide for the handling thereof by the contractor in a specified manner.

"b. As a result of any award made from subject acquisition, the awardee must prove to have financial capability to handle a contract of this magnitude. Contractor furnished supplies and equipment, labor force and uniforms are costs borne by the contractor.

"c. Kitchen Police (KP) service is considered critical to the installation. The contractor's failure to perform and/or interruptions in services would be detrimental to the welfare of the troop."

Contracting officers have the discretion to determine whether a need exists under DAR §§ 10-104.2 and 10-104.3 for performance and payment bonds requirements in a particular procurement. 52 Comp. Gen. 640, 644 (1973). Although performance and payment bonds may in some circumstances result in a restriction of competition, it is nevertheless a necessary and proper means of securing to the Government fulfillment of a contractor's obligations under his contract. Thus, where the decision to require bonds is found to be reasonable and made in good faith, we will not disturb the agency's determination. See Triple "P" Services, Inc., B-204303, December 1, 1981, 81-2 CPD 436, and cases cited therein.

Our examination of the invitation for bids shows that a considerable amount of Government-owned equipment will be used by the contractor selected to perform the required services. This finding is consistent with the contracting officer's determination and is one of the justifications for bonding requirements specifically enumerated in DAR § 10-104.2. Moreover, the contracting officer's determination that KP services are critical to the installation and that a failure to perform or interrupted service would be detrimental to the welfare of the troop is a reasonable basis for the requirement. See Triple "P" Services, Inc., supra.

While Cantu argues that it is prejudiced by the bonding requirement, we note that 22 of the 129 small businesses solicited did bid. Thus, while the bonding requirement may have been somewhat of a restriction on competition, we find that, in view of the reasonableness of the decision to require bonds, adequate competition was obtained in this procurement.

Finally, Cantu's suggestion that the bonding requirement should be waived in its behalf is not for our consideration. Paragraph L32 states that the bonds will be provided by the contractor to the contracting officer after award. Since the bonding requirement becomes the contractor's obligation under the contract, the determination whether to waive the requirement is a matter of contract administration and is not for review under our bid protest function. See Hi-Grade Cleaning, B-190889, April 14, 1978, 78-1 CPD 287.

The protest is denied.

Milton J. Fowler

Acting Comptroller General
of the United States