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DECISION

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

FILE: B-212416

DATE: May 29, 1984

MATTER OF: Executive-Suite Services, Inc.

DIGEST:

1. Performance and payment bond requirements are a necessary and proper means of securing the contractor's fulfillment of its obligations where the contract requires the contractor to have use of government property and materials in a specified manner, and where the contractor's services are essential to the government installation.

2. Bid bond requirement is valid where performance bond is required and the services covered by the solicitation are essential to the operation of a government installation and to the well-being of its personnel.

3. Firm is not an interested party under GAO's Bid Protest Procedures to protest a solicitation's pricing provisions where the firm admits it is precluded from submitting an offer because of bonding requirements held to be valid.

Executive-Suite Services, Inc. protests that the Navy's solicitation No. N62474-83-R-2945 contained certain provisions that adversely affected competition. The solicitation sought offers from commercial sources to provide base operations and maintenance services at the Naval Postgraduate School, Monterey and the Naval Facility, Point Sur, California, so that the Navy could conduct a cost comparison to determine whether to award a contract or perform the services in-house. The protester complains that the solicitation, although set aside for small business concerns, contained bonding requirements that effectively precluded it and other small businesses from competing since those concerns could not obtain such bonds. The protester also complains that the solicitation's pricing provisions placed unreasonable risks on offerors, principally by requiring the successful offeror

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to assume either a substantial portion, or all, of the costs of equipment, tools, and materials needing repair or replacement during the contract's terms. While the protest was pending, the Navy proceeded with the procurement to the extent of receiving proposals through the closing date for their submittal. The protester did not submit an offer.

We deny the protest in part and dismiss it in part.

The solicitation included a notice that offerors must submit prior to the closing date for the receipt of proposals a bid guarantee with a penal sum equal to 10 percent of the offered price, but not to exceed $1 million. The solicitation also included a notice that the successful offeror must furnish a performance bond, covering 50 percent of the contract price, and a payment bond, equal to 20 percent of the contract price.

The Navy, in its report to our Office on this protest, justifies the imposition of the bonding requirements on the basis that the successful offeror will have extensive use of government material and property which the solicitation requires the contractor to handle in a specified manner. The Navy states that the applicable procurement regulation, Defense Acquisition Regulation (DAR) § 10-104.2 (1976 ed.), specifically recognizes this circumstance as a justification for bonding requirements.[1]

The protester argues that the bonding requirements are prejudicial to small business concerns, which must pay an exorbitant premium and must pledge a great deal of their assets to obtain the bonds, while at the same time those requirements are unnecessary to serve the government's interests. The protester contends that the Navy's evaluation of offerors against elaborate technical criteria should make it extremely unlikely that an inadequate contractor will be selected. The protester further contends that the solicitation sufficiently protects government

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[1] Actually, DAR § 10-404.2 specifically authorizes a requirement for a performance bond where the contract requires the contractor to have use of government property in a specified manner. DAR §§ 10-102 and 10-104.3, respectively, authorize requirements for bid and payment bonds where a performance bond is required.

property by requiring the contractor to obtain considerable liability insurance, including coverage of property up to the amount of $100,000, within 15 days after the award of the contract.

The protester also views certain provisions authorizing monetary deductions from payments for unsatisfactory services as protecting the government against nonperformance. The protester notes that the solicitation establishes a schedule of deductions providing for deductions from payments to the contractor for unsatisfactorily performed work, and that the solicitation imposes additional liquidated damages to compensate the government for administrative costs and other expenses involved with inspecting and curing untimely or unsatisfactorily performed work.

We do not agree that the solicitation's terms concerning technical evaluation, insurance and monetary deductions make the bonding requirements unnecessary. First, the technical evaluation does not offer the Navy any legal protection after the selection is made. Second, the requirement for insurance and the provisions for deductions are indeed designed to protect the government's interests during performance, but not against the same contingencies as performance and payment bonds. Insurance and the deductions protect the government against losses and expenses which are incidental to the performance of the contract, such as accidental losses or the periodic unsatisfactory performance of individual tasks, but not against the substantial and serious failure of a contractor to perform the essential and major services themselves. See Wright's Auto Repair & Parts, Inc., B-210680.2, June 28, 1983, 83-2 CPD ¶ 34. Performance and payment bonds, in effect securing the contractor's obligation to perform the contract and assuring payment as required by law to all persons supplying labor and material in the prosecution of work under the contract, protect the government's interests against substantial failures in performance.

We often have recognized that, although requiring performance and payment bonds may in some circumstances result in restrictions of competition, such requirements are nevertheless a necessary and proper means of securing the fulfillment of a contractor's obligations where the contract requires the contractor's use of substantial government property and the contractor's services are critical to the operation of the installation and the well-being of its personnel. See, e.g., Cantu Services, Inc., B-208317, Nov. 2, 1982, 82-2 CPD ¶ 401.

Those circumstances clearly are present here, since the successful offeror will be responsible for practically the entire operations and maintenance services at the particular Naval installations. Moreover, it appears the bonding requirements did not prevent adequate competition, since three concerns submitted offers.

Further, in our view the essential nature of the services also provides an adequate justification for requiring a bid bond, which the procurement regulations (DAR § 10-102) expressly authorize where performance and payment bonds are necessary. See K.H. Services, B-212172, Sept. 15, 1983, 83-2 CPD ¶ 329. The purpose of a bid bond is to protect the government from reprocurement costs in excess of the offered price where the successful offeror fails to execute the required contract documents and submit the required performance and payment bonds. See Inland Service Corporation, B-211202, April 20, 1983, 83-1 CPD ¶ 425.

We also point out that the fact the solicitation in this case was issued for the purpose of conducting a cost comparison, and that the government does not have to include bonding costs in its in-house estimate, does not affect the validity of the bonding requirements. It is well-settled that while the government and offerors must compete on the same statement of work, see, e.g., Joule Maintenance Corporation, B-208684, Sept. 16, 1983, 83-2 CPD ¶ 333, they may be subject to different legal requirements in obtaining or performing the contract that may cause the commercial firms to suffer a cost disadvantage. See, e.g., Joule Maintenance Corporation, B-210182, Sept. 29, 1983, 83-2 CPD ¶ 389. To our knowledge, nothing limits the government's right to require bonds in cost-comparison situations to the same extent as authorized in other procurements.

We therefore deny the protest against the bonding requirements.

Since the protester concedes that what we have found are valid bonding requirements precluded it from submitting an offer under this solicitation, we need not consider the protester's challenge to the pricing provisions of the solicitation. Our Bid Protest Procedures require that a protester be an "interested party" in order to have its protest considered by this Office. 4 C.F.R. § 21.1(a) (1984). Even if we sustained Executive Suite Services' protest of these provisions, it would not result in an opportunity for the protester to qualify for award because the firm admits it cannot obtain the necessary bonds. The protester thus lacks the direct and substantial interest that is needed to make it an interested party. See Holm Well Drilling, Inc., B-207774, Oct. 22, 1982, 82-2 CPD ¶ 362. We also note that no other potential offeror has filed a protest against the solicitation's pricing provisions.

We therefore dismiss the protest as it regards the solicitation's pricing format.

The protest is denied in part and dismissed in part.

for Milton J. Socolar
Comptroller General
of the United States