The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: DWS, Inc.

File: B-224300

Date: December 18, 1986

DIGEST

Air Force regulation that prohibits the use of performance and payment bonds in nonconstruction contracts unless there is a documented history of prior default by contractors in the particular type of work to be performed does not preclude a requirement for such bonds where (1) the contracting officer's determination to require them is based, in part, on the fact that a contract for similar services at another installation was terminated for default and (2) some of the work to be performed involves construction.

DECISION

DWS, Inc. protests the terms of invitation for bids (IFB) No. F64605-86-B-0116, issued by Hickam Air Force Base, Hawaii, for housing maintenance services. DWS contends that the requirement for performance and payment bonds violates applicable Air Force regulations and unduly restricts competition.

We deny the protest.

The Air Force issued the solicitation on June 25, 1986, as a small business set-aside with an October 2 bid opening date. The agency contemplated the award of a contract for a base period of 1 year with four 1-year options. The contract is to cover routine and emergency services and change of occupancy maintenance, which entails restoration of walls, appliances, floors and windows, painting, preventive maintenance, and cleaning for 2,455 units of military family housing at Hickam Air Force Base. The protester is the incumbent contractor.

At issue in this case is whether the IFB's requirement that the successful contractor furnish a 100 percent performance bond and a 40 percent payment bond violates the applicable

Air Force regulation governing the use of such bonds for other than construction contracts. This regulation, promulgated on January 6, 1986, provides in pertinent part:

> "Performance and payment bonds shall not be required in other than construction contracts unless there is a documented history of prior default by contractors in the particular type of work to be required. Additionally, documentation of the inherent or recurring nature of such default, and the reasons therefor, must be prepared before a determination to use such bonds can be made."

Air Force Federal Acquisition Regulation Supplement (AFFARSUP) § 28.103-1 (Jan. 6, 1986).1/

DWS construes this regulation as constituting a clear prohibition against such bond requirements in nonconstruction contracts except where there is an actual history of prior default by contractors peforming similar work. DWS states that there has not been such a showing in the instant case, and it maintains that the solicitation must be amended accordingly.

The Air Force responds that this regulation should not be construed so narrowly. The Air Force argues that the regulation is not an absolute prohibition, but merely provides guidance to contracting officers. Focusing upon the exception set forth in the regulation, the Air Force continues that contracting officers may consider "additional matters" when exercising their inherent discretion to determine whether to require payment and performance bonds in a given case. The Air Force refers to what it describes as performance problems, resulting deficiency notices and payment deductions under both DWS's and a predecessor contract, and states that another Air Force installation has actually defaulted a contractor performing similar maintenance services. (We recongize that DWS disputes the Air Force's position as to its performance.) The Air Force thus maintains that the contracting officer appropriately required performance and payment bonds for this acquisition.

1/ This regulation was promulgated under authority of the Federal Acquisition Regulation, 48 C.F.R. § 1.301 (1985), which authorizes the heads of agencies, including the heads of military departments, to issue supplemental procurement regulations where deemed appropriate.

Our Office is required to give great deference to an agency's reasonable interpretation of its regulations. Big Valley Lumber Co., B-221181 et al., Apr. 2, 1986, 86-1 CPD ¶ 313. We will not question an agency interpretation unless it is shown to be unreasonable. Computer Data Systems, Inc., B-203301, Nov. 6, 1981, 81-2 CPD ¶ 393.

We have construed the Federal Acquisition Regulation (FAR) provision, 48 C.F.R. § 28.103-1 (1985), corresponding to this Air Force regulation as authorizing contracting officers to include bonding requirements in nonconstruction contracts, as long as the requirements are reasonable and imposed in good faith. See Rampart Services, Inc., B-221054.2, Feb. 14, 1986, 86-1 CPD ¶ 164. The Air Force regulation somewhat limits the discretion afforded contracting officers under the FAR, since it requires a showing of a prior default by a contractor performing the particular type of nonconstruction work called for in the subject solicitation. In our opinion, only after such a showing is made can the contracting officer look at additional matters, and then only for the limited purpose of determining whether the default is of an inherent or recurring nature. See S.F.A. Corp., B-212855, Jan. 9, 1984, 84-1 CPD ¶ 57 (stating that in determining the interpretation of a regulation, we focus upon the plain meaning).

Here, we conclude that the justification set forth by the contracting officer to require performance and payment bonds satisfied this regulatory scheme. The contracting officer first showed that a contract for family housing maintenance services at Wright Patterson Air Force Base had been terminated for default. Then, by referring to what the agency considers unsatisfactory performance under the current and predecessor contracts at Hickham Air Force Base, the contracting officer showed that the default may be of an inherent or recurring nature.

In addition, as the agency points out (and the protester does not dispute), this contract will involve construction-related activities that are covered by the minimum wage requirements of the Davis Bacon Act, 40 U.S.C. § 276(a) (1982). The tasks in this category include major painting of more than 200 square feet and major floor refinishing of more than 300 square feet a unit. Assuming that these tasks are severable and meet the Act's $2,000 threshold, they are properly classified as construction. See Dynalectron Corp., B-220588, Feb. 11, 1986, 86-1 CPD ¶ 68. Thus, the Air Force regulation at issue here, which by its terms applies only to nonconstruction contracts, is not applicable to the entire contract to be awarded under the protested solicitation.

Finally, the Air Force argues that competition was not unduly restricted in that two prior solicitations with similar requirements drew responses from nine and five small business bidders, respectively. In view of these circumstances, we will not disturb the determination of the contracting officer to require performance and payment bonds for this procurement.

The protest is denied.

for Seymour Efros
Harry R. Van Cleve
General Counsel