

*A. Benjam*



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Remtech, Inc.  
**File:** B-240402.5  
**Date:** January 4, 1991

Thomas C. Pool for the protester.  
Frank G. Hunter for Noble Enterprises, Inc., and W. Stewart Taylor for Stay, Inc., interested parties.  
Herbert F. Kelley, Jr., Esq., and Major Jack B. Patrick, Department of the Army, for the agency.  
Aldo A. Benjam, Esq., and Christine S. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

### DIGEST

1. Bidder who protested terms of invitation for bids (IFB) prior to bid opening is an interested party to challenge IFB's payment bond requirement, notwithstanding that protester's bid was nonresponsive because it failed to include a required bid bond, since if the protest were sustained, the remedy would be a resolicitation under which the protester could compete.
2. Protest of payment bond requirement in invitation for bids (IFB) for security guard services is denied since it is within the agency's discretion to require bonding even in an IFB set aside for small businesses; the agency's requirement for uninterrupted performance of the security guard services is a reasonable basis for imposing the bonding requirement, especially where previous contractors had a history of unsatisfactory performance and of not paying wages due employees.
3. Protester's new and independent grounds of protest are dismissed where the later raised issues do not independently satisfy the timeliness rules of the General Accounting Office Bid Protest Regulations.

### DECISION

Remtech, Inc. protests the requirement for a payment bond in invitation for bids (IFB) No. DABT01-90-B-0029, issued by the Department of the Army for security guard services at Fort Rucker, Alabama. Remtech alleges that the payment bond

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requirement is burdensome on small businesses, unduly restricts competition, and is excessive in amount.

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

#### BACKGROUND

The Army issued the IFB on June 22, 1990, as a total small business set-aside, for a 1-year base period with up to two 1-year options. The IFB required bidders to submit a bid bond in an amount equal to 20 percent of the bid price for the base year. The IFB also required the successful bidder to submit a performance bond in an amount equal to 100 percent of the contract price, and a payment bond in an amount equal to 40 percent of the contract price. Of the six bids received by the extended bid opening date of October 2, the contracting officer rejected the low bid as nonresponsive for failure to include the required bid bond. Of the remaining five bids, Stay, Inc. submitted the low bid and Remtech submitted the second low bid.

Remtech protested to our Office on September 28, prior to bid opening, challenging the payment bond requirement as excessive and unduly restrictive of competition. Remtech argues that its ability to obtain the required 100 percent performance bond, which it does not challenge, should be sufficient to indicate that it is fiscally responsible and able to satisfy all debts arising out of the resultant contract.

#### INTERESTED PARTY STATUS

As a preliminary matter, the agency argues that Remtech is not an interested party to maintain the protest. The agency states that after reviewing the documents submitted by Remtech at bid opening, the contracting officer determined that Remtech's bid was nonresponsive because the bid bond was not an original document, but rather a photocopy which did not contain the original signature of the surety.<sup>1/</sup> The agency argues that since the contracting officer properly determined Remtech's bid to be nonresponsive, Remtech is not an interested party to challenge the IFB's payment bond requirement, as Remtech would not be in line for award even if its protest were sustained.

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<sup>1/</sup> The agency correctly cites our decisions in Pollution Control Indus. of America, B-236329, Nov. 22, 1989, 89-2 CPD ¶ 489, and G & A General Contractors, B-236181, Oct. 4, 1989, 89-2 CPD ¶ 308, as authority for its determination that Remtech's bid was nonresponsive. Remtech does not challenge the rejection of its bid on that basis.

Under the Competition in Contracting Act of 1984, 31 U.S.C. § 3551(2) (1988), and our Bid Protest Regulations, 4 C.F.R. § 21.0(a) (1990), a protest may be filed only by an "interested party," defined as an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of or failure to award a contract. Determining whether a party is sufficiently interested involves consideration of a party's status vis a vis the procurement, Seals Servs., Inc., B-235523, June 20, 1989, 89-1 CPD ¶ 581, and the nature of the issues protested. Free State Reporting, Inc. et al., B-225531 et al., Jan. 13, 1987, 87-1 CPD ¶ 54.

Here, if the protest were sustained, the appropriate remedy would be cancellation of the IFB and a resolicitation under which Remtech could recompet. Since Remtech would have the opportunity to rebid and remedy its bid bond defect under a new solicitation, we find that it is an interested party to maintain the protest against the IFB's payment bond requirement. Big State Enters., 64 Comp. Gen. 482 (1985), 85-1 CPD ¶ 459; H.V. Allen Co., Inc., B-225326 et al., Mar. 6, 1987, 87-1 CPD ¶ 260; Tracor Jitco, Inc., B-220139, Dec. 24, 1985, 85-2 CPD ¶ 710.

#### TIMELINESS

Three firms--Select Investigative Services, Inc., Gold Key Security Services, Inc., and Char-Von Enterprises, Inc.--protested the performance bond requirement in the IFB to our Office prior to the original bid opening date of July 23. We dismissed the protests because the protesters failed to respond to the agency report within the time required under our Bid Protest Regulations, 4 C.F.R. § 21.3(k). A fourth firm, Southern Corrections Systems, Inc., challenged the payment bond requirement; Southern withdrew its protest on August 28.

The Army argues that we should treat Remtech's protest--filed on October 1, before the amended bid opening date--as an untimely request for reconsideration of the prior protests. We see no basis for doing so. As a preliminary matter, three of the protests involved the performance bond requirement only, not the payment bond requirement that Remtech challenges; moreover, those protests were dismissed without a decision on the merits. Similarly, the fourth protest, which did challenge the payment bond requirement, was withdrawn. We fail to see why Remtech should be deprived of its right to file a timely protest on its own behalf by virtue of the withdrawal of a similar protest or the dismissal on procedural grounds of other protests not raising the same issue.

## PAYMENT BOND REQUIREMENT

Although Remtech concedes that it was able to obtain all of the required bonds under the IFB, including the payment bond, the protester alleges that the payment bond requirement is burdensome on small businesses and excessive in amount, since no loss under the contract could reach the magnitude contemplated by the payment bond (i.e., 40 percent of the contract price).

The Miller Act, 40 U.S.C. § 270a(a) (1988), establishes the requirement for performance and payment bonds in construction contracts. In implementing the Act, Federal Acquisition Regulation (FAR) § 28.103-2(a) authorizes the contracting officer to require a performance bond "when necessary to protect the government's interest"; under FAR § 28.103-3(a), a payment bond is proper where a performance bond is required and the payment bond "is in the government's interest."

The purpose of a payment bond is to provide suppliers of labor and material the security that they ordinarily enjoy under state mechanic's lien laws, but which, because of the government's constitutional immunity, they do not have on federal property or work. F.D. Rich Co., Inc. v. United States, Indus. Lumber Co., Inc., 417 U.S. 116 (1974). The imposition of a payment bond, while proper only where a performance bond is required, FAR § 28.103-3(a), is not limited to construction contracts; rather, the FAR recognizes that there are situations in which bonds may be necessary for nonconstruction contracts in order to protect the government's interest. See FAR §§ 28.103-1(a), 28.103-2(a); IBI Sec., Inc., B-235857, Sept. 27, 1989, 89-2 CPD ¶ 277 (bid and performance bonds were properly required in IFB for security guard services); Professional Window and Housecleaning, Inc., B-224187, Jan. 23, 1987, 87-1 CPD ¶ 84 (requirement for bid, performance and payment bonds proper in IFB for custodial and general housecleaning services).

While a bond requirement may, in some circumstances, result in a restriction of competition, it nevertheless may be a necessary and proper means of securing to the government fulfillment of the contractor's obligations under a nonconstruction contract in appropriate situations. Aspen Cleaning Corp., B-233983, Mar. 21, 1989, 89-1 CPD ¶ 289. In reviewing a challenge to the imposition of a bonding requirement we look to see if the requirement is reasonable and imposed in good faith. PBSI Corp., B-227897, Oct. 5, 1987, 87-2 CPD ¶ 333. A finding on the part of the agency that continuous operations are absolutely necessary is a sufficient basis for requiring a performance bond, even in a solicitation set aside for small businesses. Id.; IBI Sec., Inc., B-235857, supra.

Here, the contracting officer determined that the government must have uninterrupted security guard services, including continuous protection of classified aircraft; regular patrols of airfield ramps; restricted access to the facility; and guarded ammunition supply points. The contracting officer states that any interruption in the security guard services at the facility could cause lapses in security coverage or emergency reprocurement costs.

The record further shows that in determining whether to impose the bonding requirement, the contracting officer considered the history of security guard contractors at the facility over the past 5 years, which is marked by repeated unsatisfactory performance and contractors that failed to pay their employees. Since 1985, two contractors were terminated for default and two other contractors failed to pay their employees over \$115,000 in wages and fringe benefits. On at least four occasions within the last 3 years, the Department of Labor requested that the agency withhold money due contractors providing security guard services for unpaid wages due their employees. The Internal Revenue Service filed liens against three out of the past four security guard contractors at Fort Rucker for unpaid federal taxes. Additionally, the past three security guard contractors left the State of Alabama without paying over \$285,000 in applicable state unemployment taxes.

Given the history of unsatisfactory performance and nonpayment of contractor employees, the agency properly was concerned about ensuring that guards are compensated for their work, and that the security services are performed without interruption. In light of the government's interest in ensuring continuous guard services for a facility containing classified equipment and requiring a constant high level of security, the contracting officer reasonably found that a payment bond was necessary here.<sup>2/</sup>

To the extent that Remtech argues that requiring a payment bond in an amount equal to 40 percent of the contract price

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<sup>2/</sup> With regard to Remtech's contention that the bond requirement unduly restricted competition, the agency in fact received six bids from small business concerns. Thus, it does not appear that requiring a payment bond discriminated against small businesses. See Space Servs. Int'l Corp., B-215402.2, Oct. 22, 1984, 84-2 CPD ¶ 430.

is excessive, 40 U.S.C. § 270a(a)(2), establishing the amount of Miller Act payment bonds, states in relevant part:

"Whenever the total amount payable by the terms of the contract shall be not more than \$1,000,000 the said payment bond shall be in a sum of one-half the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than \$1,000,000 and not more than \$5,000,000, the said payment bond shall be in a sum of 40 per centum of the total amount payable by the terms of the contract. Whenever the total amount payable by the terms of the contract shall be more than \$5,000,000 the said payment bond shall be in the sum of \$2,500,000." (Emphasis added.)

Paragraph H.11 of the IFB duplicates FAR § 28.102-2(b), which implements the above provision of the Act with virtually identical language.<sup>3/</sup> The agency states that this provision is a standard clause included in all solicitations with bonding requirements. Remtech's mere disagreement with the amount of the required bond, or the fact that previous solicitations for similar requirements have not imposed a payment bond requirement,<sup>4/</sup> does not establish that the payment bond amount here, established by reference to the Miller Act and FAR provision, is unreasonable.

Remtech's argument that no loss under the contract could reach the proportion of coverage required by the payment bond, since it expended less than \$140,000 on the last contract for security guard services, is without merit. In support of its position, Remtech submitted a list of total purchases (vehicles, uniforms and personal equipment, and weapons), and yearly expenditures (training ammunition, telephones, physicals, and credit checks) totalling \$138,020, stating that "this total shows the sum of all requirements to run this contract." Remtech's calculations, however, ignore the fact that Remtech's own bid of over \$2 million is primarily

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<sup>3/</sup> Under this clause, Remtech would be required to submit a payment bond in the amount of 40 percent of the total amount payable under the contract, since its evaluated bid price was \$2,266,755.

<sup>4/</sup> The protester included in its comments on the agency report what appears to be a list of approximately 48 solicitations issued by various federal agencies for security guard services between July 1, 1990, and October 22, 1990, which presumably imposed no payment bond requirement.

composed of employee wages--the nonpayment of which is precisely what the payment bond is intended to protect against.

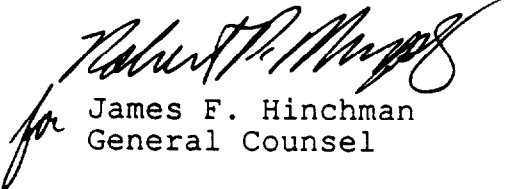
Accordingly, we see no basis to object to the contracting officer's decision to impose performance and payment bonds to protect the government's interest, especially in light of the history of unsatisfactory performance, nonpayment of employees, and where continuous security services at the facility are essential.

#### PROCUREMENT FORMAT

For the first time in its comments on the agency report, Remtech challenges the IFB's lack of appropriate "evaluation criteria" and contends that the procurement should be conducted using a negotiated format, rather than under an IFB. Remtech's objections, however, are allegations of improprieties in the solicitation and are therefore untimely under our Bid Protest Regulations.

A protest based upon alleged improprieties in a solicitation which are apparent prior to bid opening must be filed prior to that date to be timely. See 4 C.F.R. § 21.2(a)(1). Where a protester initially files a timely protest and later supplements it with new and independent grounds of protest, the latter raised allegations must independently satisfy the timeliness requirements, since our Regulations do not contemplate the unwarranted piecemeal presentation or development of protest issues. Id.; Tri States Servs., B-232322, Nov. 3, 1988, 88-2 CPD ¶ 436. Thus, a protest challenging the procurement format or alleging the IFB lacked appropriate "evaluation criteria," must have been filed prior to bid opening to be timely. Since Remtech raised these issues for the first time nearly 1 month after bid opening, its protest on these bases is dismissed as untimely.

The protest is denied in part and dismissed in part.

  
for James F. Hinchman  
General Counsel