



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

145639
Arsenoff

Decision

Matter of: Duron, Inc.
File: B-245515
Date: January 13, 1992

Stephen F. Dial, Esq., Kircher & Nakazato, for the protester.
Lester Edelman, Esq., Department of the Army, for the agency.
Robert C. Arsenoff, Esq., and John Brosnan, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest against solicitation performance bond requirement is denied where record shows that agency reasonably determined that a bond was necessary to insure timely delivery of cryogenic pumps to be utilized in a coordinated project to construct a large blast thermal simulator and where solicitation provided that contractor was to be paid 96 percent of its bid price prior to the delivery of the pumps.

DECISION

Duron, Inc. protests the bonding requirements contained in invitation for bids (IFB) No. DACA63-91-B-0134, issued by the Army Corps of Engineers for high pressure cryogenic pumps which, along with items to be purchased under two separate solicitations, are to be used as government furnished equipment (GFE) under a contract to be awarded for the construction of a large blast thermal simulator in New Mexico. The protester alleges that the bonding requirements are unwarranted and restrictive of competition.

We deny the protest.

The IFB was issued on July 1, 1991, as one of four separate solicitations relating to the thermal simulator project. It calls for the fabrication, testing and delivery of a base quantity of four pumps by February 1993 so that they can be used by the construction contractor as GFE in the overall project effort. It further provides for "partial payments"

as a percentage of the bid price as the following tasks are performed and accepted by the agency:

ITEM	PERCENT PAYMENT
Submittals [required data]	6.0
Fabrication	60.0
Shop testing	30.0
Delivery	4.0

The IFB also requires a bid bond amounting to 20 percent of the bid price and a performance bond of 100 percent of the contract price.

The contracting officer states that these bonds are necessary to protect the interests of the government in the event of a default since timely delivery of the pumps--which he states are not off-the-shelf items--is critical to completion of the entire long-term simulator project. Further, agency counsel notes that Federal Acquisition Regulation (FAR) § 28.103-2(a)(3) specifically authorizes the use of performance bonds in nonconstruction contracts where "[s]ubstantial progress payments are made before delivery of end items starts." According to the Army, since 96 percent of the contract price is to be paid before the pumps are actually delivered, a performance bond is necessary to protect the government's financial interests.

Duron questions the accuracy of the agency's assertion that it requires bonding protection to ensure timely delivery of specialized pumps, since, in the protester's view, the pumps are off-the-shelf items. Duron also argues that the cited FAR section only authorizes bonding where "progress payments" are part of the contract and states that the IFB contains a provision for "partial payments." In the protester's view, the distinction between payments made to reimburse contractors for expenses incurred during contract performance (i.e., progress payments) and payments made upon the completion of phases of a contract (i.e., partial payments) removes the IFB from the ambit of the regulation and means that the bonding requirement is not authorized. Finally, the protester argues that the bonding requirement in the protested IFB is redundant since a solicitation for another part of the project--a pebble bed vaporizer--allegedly contains a "blanket" bonding requirement to cover other phases of the project. The protester concludes that the bonding requirement was solely included in the IFB to limit competition to a single source for the pumps.

The regulations state that although agencies generally should not require performance or payment bonds for other than construction contracts, these bonds may be required for


nonconstruction contracts--such as the one at issue here--where needed to protect the interests of the government. FAR §§ 28.103-1 and 28.103-2. The regulation gives four examples of such situations: (1) where government property or funds are to be provided to the contractor for its use or as partial compensation; (2) where the government wants assurance that the contractor's successor in interest is financially capable; (3) where substantial progress payments are made before delivery begins; and (4) where the contract is for dismantling, demolition, or removal of improvements. FAR § 28.103-2(a).

In our view, the regulations permit the use of bonding requirements in every situation where they are needed to protect the government's interests, not only in the four situations specifically mentioned. RCI Mgmt., Inc., B-228225, Dec. 30, 1987, 87-2 CPD ¶ 642. In reviewing a challenge to the imposition of a bonding requirement, we look to see if the requirement is reasonable and established in good faith. Id.

Regardless of whether, as the protester argues, the pumps are routine items, the record shows that the pumps are required to be delivered on time for use as GFE as part of a coordinated effort involving several interdependent contractors to finish the simulator project. Whether the payments to be made are viewed as progress payments or partial payments, the fact of the matter is that 96 percent of the contract price is scheduled to be paid prior to the actual delivery of pumps to the project site. In view of these circumstances, and since strict adherence to the list of examples for imposing bonding requirements contained in FAR § 28.103-2 is simply not a legal requirement as Duron suggests, we think the agency could reasonably conclude that bonding is required to protect the government's interests in assuring timely delivery after a major portion of the contract price had been paid. Also, contrary to the protester's assertion that the pebble bed vaporizer solicitation contained a bonding requirement which covered the entire simulator project, we have examined the bonding provisions of that solicitation and find that it contains no "blanket" coverage as alleged by Duron.

Since we find the bonding requirement to be reasonable, the possibility that it may serve to limit competition as alleged by Duron is legally irrelevant. Professional Window and Housecleaning, Inc., B-224187, Jan. 23, 1987, 87-1 CPD ¶ 84.

The protest is denied.


for James F. Hinchman
General Counsel