



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Cobra Technologies, Inc.

File: B-249323

Date: October 30, 1992

Joseph J. Mack for the protester.
Dennis Mullins, Esq., and Manuel B. Oasin, Esq., General Services Administration, for the agency.
David Hasfurther, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest against a bonding requirement in a solicitation is denied where, even assuming the requirement would result in a restriction of competition, the agency's need to assure the uninterrupted performance of the solicited services constitutes a reasonable basis for imposing the requirement.

DECISION

Cobra Technologies, Inc. protests the bonding requirement in request for proposals (RFP) No. GS-03P-92-DWC-0060, issued by the General Services Administration (GSA) for facility management, operations and maintenance, elevator maintenance, and custodial services at the J. Caleb Boggs Federal Building and Courthouse in Wilmington, Delaware.

Cobra argues that these bond requirements are not necessary since GSA can protect itself from poor performance and contractor default through the technical evaluation of the offeror's capabilities called for under the RFP and through proper post-award contract management. Cobra argues that the bond requirements are in direct conflict with the intent of the Federal Acquisition Regulation (FAR) § 28.103-1(a), which admonishes against use of bonding requirements for nonconstruction contracts, and that the bonding requirements here increase the contracting costs on small businesses and constitute an unfair restriction on competition. Cobra notes that two GSA regions have made use of solicitations of this type without requiring bonds.

We deny the protest.

The RFP required an offeror to furnish with its offer a bid guarantee to assure that the offeror would execute further contract documents and bonds as required. The RFP further required that a performance bond be provided after contract award. The performance bond requirement was determined to be necessary to ensure continuous building operations.

Although, as a general rule, agencies are admonished against the use of bonding requirements for nonconstruction contracts, FAR § 28.103-1(a), the regulations permit the use of bonding requirements in situations where they are needed to protect the government's interests. Duron, Inc., B-245515, Jan. 13, 1992, 92-1 CPD ¶ 52; Cobra Technologies, Inc., B-238031 et al., Feb. 27, 1990, 90-1 CPD ¶ 242. In reviewing a challenge to the imposition of a bonding requirement as unduly restrictive of competition, we look to see if the requirement is reasonable and established in good faith. RCI Mgmt., Inc., B-228225, Dec. 30, 1987, 87-2 CPD ¶ 642.

We find that GSA reasonably imposed the bonding requirement for this procurement. The agency explains that the bonding requirement was necessary to ensure uninterrupted performance. As GSA explains, a contractor's failure to operate and maintain all mechanical, electrical and utility apparatus, including the heating, air conditioning, emergency lights, and fire protection systems in the building, as is required here, could make the building unsafe and uninhabitable and adversely affect critical work such as court proceedings. A performance bond protects the government's interest in ensuring continuous performance by securing performance and fulfillment of the contractor's obligations under the contract. Since the contractor would forfeit its bond if it fails to meet its contractual obligations, the bond provides an incentive for a contractor to meet performance requirements, and in the worst case, where the contractor defaults, the government has the benefit of a bonding company that could quickly arrange to take over the contract to insure continuous service.

Cobra argues that the technical evaluation required under the RFP, which includes a review of a firm's management plan, proposed personnel and prior experience, and the RFP provision providing payment deductions for unsatisfactory performance, make the bonding requirement unnecessary. We have specifically rejected arguments that the same government interest a performance bond is designed to protect is adequately protected by other elements of the procurement process or by contract administration. D.E.W. Mgmt. Servs., Inc., B-246955, Apr. 10, 1992, 92-1 CPD ¶ 358. The evaluation of proposals here measures the capabilities of the firm to perform, that is, the likelihood that the firm can successfully perform the services, but provides the

agency no legal protection in the event of a default after award occurs. Further, the provision for payment deductions for unsatisfactory performance protects the government against losses and expenses that are incidental to performance of the contract, but not against the substantial and serious failure of a contractor to perform essential services which can result in default. See Rampart Servs., Inc., B-221054.2, Feb. 14, 1986, 86-1 CPD ¶ 164.

Finally, Cobra's argument that other GSA regions have acquired the same services under contracts without the bonding requirement has no bearing on this procurement. Each procurement stands on its own, and Cobra's argument does not establish the unreasonableness of GSA's imposition of the requirement here, given our conclusion that the agency was justified in using the requirement to ensure continuity of building services. Cobra Technologies, Inc., supra.

The protest is denied.


for James F. Hinchman
General Counsel