



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: TLC Services, Inc.

File: B-255331

Date: February 22, 1994

Elizabeth Aviles-Rogers for the protester.
Joel S. Rubinstein, Esq. for Custom Environmental Service, Inc., an interested party.
Lydia Kupersmith, Esq., General Services Administration, for the agency.
Adam Vodraska, Esq., and Barbara R. Timmerman, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest against bid and performance bond requirements in an invitation for bids for maintenance services, set aside for small business, is denied where the contracting officer reasonably determined that the bonding is required to ensure uninterrupted performance and for the protection of government property.

DECISION

TLC Services, Inc. (TLC) protests the bid and performance bond requirements in invitation for bids (IFB) No. GS-11P-93-MJD-0065, issued by the General Services Administration (GSA).¹ The contract is a small business set-aside for landscape maintenance services at the Federal Center in Suitland, Maryland. The IFB contains requirements for a bid bond amounting to 20 percent of the bid price, and a performance bond, also amounting to 20 percent of the bid price for the initial year, with renewed bonding for the option years.

TLC asserts that the bonding requirements were imposed contrary to Federal Acquisition Regulation (FAR), 48 C.F.R. § 28.103, and argues that the requirements unduly restrict competition. The protester states that the bonding

¹TLC actually protested the requirement for performance and payment bonds. Since the solicitation did not require a payment bond we are treating TLC's protest as against the required bid bond and performance bond.

requirements are inappropriate under a small business set-aside, noting the difficulty faced by small businesses in obtaining bonds. In the protester's opinion, GSA is using the bidders' ability to obtain bonds in lieu of making responsibility determinations. TLC also notes that a contractor's liability insurance protects the government and that several other local facilities have awarded maintenance contracts without requiring bonds.

We deny the protest.

Although, as a general rule, in the case of nonconstruction contracts agencies are admonished by FAR, 48 C.F.R. § 28.103-1(a), against the use of bonding, requiring bonding may be necessary in some situations to secure fulfillment of a contractor's obligations to the government. Maintrac Corp., B-251500, Mar. 22, 1993, 93-1 CPD ¶ 257. We will not disturb a contracting officer's determination that bonding is necessary unless we find it to be unreasonable. D.E.W. Management Services, Inc., B-246955, Apr. 10, 1992, 92-1 CPD ¶ 358.

Four situations that may warrant performance bonds to protect the government's interest are listed in FAR, 48 C.F.R. § 28.103-2(a). Use of government property by the contractor in performing the contract is one of these situations. In the present case, the contractor would have responsibility for approximately \$2.3 million worth of government property, including trees, turf, shrubbery, and other landscaping. We have consistently found that requirements for performance bonds are reasonable means of securing the fulfillment of a contractor's obligations where the contract requires the contractor's use of substantial government property. Harris System International, Inc., B-219763, Oct. 18, 1985, 85-2 CPD ¶ 423.

Furthermore, the situations listed in FAR, 48 C.F.R. § 28.103-2(a) are examples, and do not preclude an agency from requiring bonds in other appropriate circumstances. See Professional Window and Housecleaning, Inc., B-224187, Jan. 23, 1987, 87-1 CPD ¶ 84. A finding on the part of the agency that continuous operations are necessary is a recognized basis for requiring a performance bond. D.E.W. Management Services, Inc., supra. Further, an agency may require a bid bond whenever there is a requirement for a performance bond. FAR 48 C.F.R. § 28.101-1(a).

Based on prior experience, GSA imposed the performance bond requirement to minimize the possibility that bidders may bid below cost and eventually default. Absent proper landscape maintenance, the upkeep of the grounds of the Suitland Federal Center would deteriorate, and the Center's many trees and plants would be in danger of becoming overgrown,

diseased, insect infested, and/or drought stricken. Since GSA lacks the capability to immediately perform the necessary services should the contractor not perform, a failure in maintenance services would obviously have an adverse impact upon the upkeep of the facility, which is located in a large suburban campus setting. Thus, GSA's decision to require a performance bond to ensure the continuous performance of necessary services and to protect government property is reasonable, and we will not disturb the contracting officer's determination.

While TLC may be correct that the bonding requirements will exclude some small businesses from the competition, this possibility alone does not render the bonding requirements improper. Triple P Services, Inc., B-249443, Oct. 30, 1992, 92-2 CPD ¶ 313; Aspen Cleaning Corporation, B-233983, Mar. 21, 1989, 89-1 CPD ¶ 289. GSA received bids from six small businesses, four of which were responsive and provided bid bonds. This is strongly indicative that the bonding requirement was not an unreasonable restriction of competition.

TLC also argues that instead of bonding requirements, GSA's needs can be similarly met by an adequate analysis of bidder responsibility and that, in any event, a defaulting contractor would be liable for procurement costs. 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. Management Services, Inc., *supra*. For example, in Express Signs International, B-225738, June 2, 1987, 87-1 CPD ¶ 562, we explained that a preaward responsibility survey is only an evaluation of a prospective contractor's capability to perform a proposed contract, and does not offer an agency any legal protection after award is made. Similarly, a default clause provides only a method for the government to terminate a contract if the contractor fails to perform, and makes the contractor liable for excess costs of procurement--it does not guard against the substantial and serious failure of a contractor to perform essential services. A performance bond requirement is a legitimate means of reducing this risk.

Moreover, a contractor's liability insurance is not designed to protect the government against the same contingencies as a performance bond--insurance covers accidental losses and expenses that are incidental to performance, but not the failure of the contractor to perform the services themselves. Harris System International, Inc., *supra*. As for TLC's assertion that other agencies have not included bonding requirements in their procurements for similar maintenance services, each procurement stands on its own and

the fact that other agencies' judgments as to the necessity for bonding may have been different under the particular circumstances of other procurements does not establish the unreasonableness of the bonding requirements here. Triple P Services, Inc., supra; Cobra Technologies, Inc., B-249323, Oct. 30, 1992, 92-2 CPD ¶ 310.

The protest is denied.

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for Robert P. Murphy
Acting General Counsel