



G A O

Accountability * Integrity * Reliability

**Comptroller General
of the United States**

**United States General Accounting Office
Washington, DC 20548**

Decision

Matter of: Apex Support Services, Inc.

File: B-288936; B-288936.2

Date: December 12, 2001

Timothy P. Healy for the protester.
Sherri Snowden for Zeta Construction Corporation, an intervenor.
Gay F. Chase, Esq., General Services Administration, for the agency.
Jennifer D. Westfall-McGrail, Esq., and Christine S. Melody, Esq., Office of the
General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest against performance bond and bid guarantee requirements is sustained where agency fails to demonstrate that it reasonably determined that bonding requirements were necessary to protect the government's interest.

DECISION

Apex Support Services, Inc., a very small business concern, protests the bonding requirements in request for proposals (RFP) No. GS05P01GAC0168, issued by the General Services Administration (GSA) for planning and estimating services. Apex contends that the bonding requirements unduly restricted competition.

We sustain the protest.

The RFP requested the services of two planner/estimators, one to work at a GSA office in Cleveland and the other to work at a GSA office in Cincinnati, for a base period of 1 year and two option periods of 1 year each. The two individuals are to be responsible for requesting, inspecting, and accepting construction work on behalf of the government. Tasks which they will perform include developing specifications, finalizing scopes of work, scheduling work, performing cost estimation, and preparing procurement documents. The solicitation included requirements for a bid guarantee (in an amount equal to 20 percent of the bid amount for the base period of performance) and a performance bond (in an amount equal to 20 percent of the contract price for the initial 12-month period).

The protester argues that the bonding requirements would effectively bar it and other similarly situated small and very small businesses from submitting offers and that there are less restrictive ways to protect the government's interests.¹

As a preliminary matter, GSA argues that the protester is not an interested party to protest the terms of this solicitation because it did not submit a proposal in response to the RFP and thus would not be in line for award if its protest were sustained.

We disagree. Whether a protester is an interested party is determined by the nature of the issues raised and the direct or indirect benefit or relief sought. Courtney Contracting Corp., B-242945, June 24, 1991, 91-1 CPD ¶ 593 at 4. Where, as here, the protester challenges the terms of a solicitation that allegedly deterred it from competing, and the remedy sought is the opportunity to compete under a revised solicitation, it is an interested party to protest the terms of the solicitation even if it did not submit a bid or offer under the challenged solicitation. Id. at 4-5.

Regarding the merits of Apex's protest, the Federal Acquisition Regulation (FAR) instructs that agencies generally should not require performance bonds for other than construction contracts.² FAR § 28.103-1. The FAR goes on to recognize, however, as an exception to this general rule, that performance bonds may be required for contracts exceeding the simplified acquisition threshold when necessary to protect the government's interest. FAR § 28.103-2. The FAR gives four examples of such situations (where government property or funds are to be provided to the contractor for its use or as partial compensation; where the government wants assurance that a contractor's successor-in-interest is financially capable; where substantial progress payments are to be made before delivery begins; and where the contract is for dismantling, demolition, or removal of improvements, id.), but we have recognized that this list is not exhaustive and that there may be other circumstances where a bond is required to protect the government's interest. RCI Mgmt., Inc., B-228225, Dec. 30, 1987, 87-2 CPD ¶ 642 at 2. In reviewing a challenge to the imposition of a bonding requirement, we consider whether the requirement is reasonable. E.D.P. Enters., Inc., B-282232, June 17, 1999, 99-2 CPD ¶ 42 at 3.

Here, the contracting officer determined that a performance bond was necessary to protect the government's interest based on the following considerations:

¹ The protester also argued that the agency improperly had failed to include past performance as an evaluation factor in the RFP. The agency subsequently took corrective action in response to this ground of the protest, advising that it would amend the RFP to include past performance as an evaluation factor.

² A contracting officer may not require a bid guarantee unless a performance bond or a performance and payment bond is also required. FAR § 28.101-1(a). Accordingly, we focus our analysis on the performance bond requirement.

- The contractor will have use of government property (facilities) in performance of the required services.
- The estimated value of the initial contract is over \$100,000, representing a significant volume of requirements which are considered essential to GSA's mission.
- At the least, the health, welfare, and morale of visitors and employees at the location where services will be provided would be negatively affected should the contractor fail to perform. It is also possible that, should the contractor fail to perform, it would be impossible for essential governmental functions to be carried out.
- As the government does not have the means to perform the service in the event of the contractor's default, the ability to resort to the contractor's surety to obtain the required services may be vital.

Memorandum for the Solicitation File (July 20, 2001).

We cannot conclude that the agency's imposition of a bonding requirement here was reasonable based upon the rationales advanced by the agency. First, regarding the agency's contention that the contractor will have use of government facilities in performance of the services, the only government facilities to be furnished are office space, furnishings, and furniture for two contractor employees.³ RFP at § C.F. In our view, this is not a furnishing of government facilities sufficient to justify the

³ In response to our request for clarification of the type of facilities to be furnished to the contractor, the agency noted that the contractor would be provided "office space and office equipment (telephone, computers, computer software, printers, fax machine, etc.)" GSA Memorandum, Nov. 7, 2001, at 1. In commenting on the agency response, the protester complained that the solicitation had not identified these items and asked that the agency be required to amend the RFP to include a list of the property to be furnished to the contractor.

This complaint is not appropriate for resolution in our forum because the protester has not alleged that the agency's failure to enumerate the precise items to be furnished to the contractor resulted in a restriction on competition. Since our role in considering protests is to ensure that the statutory goals for full and open competition are met, our Office will not consider an argument that a solicitation should be written differently unless a restriction on competition is alleged. Purification Env'tl., B-259280, Mar. 14, 1995, 95-1 CPD ¶ 142 at 2.

In any event, we think that a reasonable offeror would have understood office "furnishings," as that term is used in the RFP, as encompassing the office equipment that the agency has enumerated; accordingly, we see no reason that GSA should be required to amend the RFP to list the equipment item by item.

imposition of a performance bond in an amount equivalent to 20 percent of the contract price for the initial 12-month period. See Bara-King Photographic, Inc., B-226408.2, Aug. 20, 1987, 87-2 CPD ¶ 184 at 3.

Further, we find unpersuasive the agency's bare assertion that the health, safety, and morale of government employees and members of the public would be negatively affected should the contractor fail to perform. Likewise, we find unpersuasive GSA's assertion that the government does not have the means to perform the services in the event of the contractor's default. In contrast to other cases where we have upheld bonding requirements on the basis that continuous performance of the solicited services is critical to personnel health, safety, or welfare, see, e.g., Northern Mgmt. Servs., Inc., B-261424, June 26, 1995, 95-1 CPD ¶ 291 at 2; Diversified Contract Servs., Inc., B-233620, Feb. 21, 1989, 89-1 CPD ¶ 180 at 3, or that reprourement of the services within the necessary timeframe would be difficult should the contractor default, see, e.g., RCI Mgmt, Inc., *supra*, at 2; Dohrman Mach. Prod., Inc., B-236003, Oct. 12, 1989, 89-2 CPD ¶ 344 at 3, the agency here has not explained either how a disruption in services would jeopardize employee health, safety, or welfare or why it would have difficulty in reprocurring the services should the contractor fail to perform. Moreover, the arguments raised by the agency--i.e., that a disruption in services would have a negative impact on the agency and that it does not have the capability to perform the services in-house--would apply to virtually any service contract; had the drafters of the FAR intended for the inclusion of a performance bond requirement in solicitations for service contracts to be the norm, as opposed to the exception, they would not have included the instruction that agencies should generally not require performance bonds for other than construction contracts.

We conclude that GSA has failed to demonstrate that a performance bond is required to protect the government's interest here. Accordingly, we sustain Apex's protest. We recommend that the agency amend the RFP to delete the bonding requirements and solicit another round of offers. We also recommend that the agency reimburse the protester for its costs of filing and pursuing the protest. Bid Protest Regulations, 4 C.F.R. § 21.8(d)(1) (2001). In accordance with section 21.8(f) of our Regulations, Apex's claim for such costs, detailing the time expended and the costs incurred, must be submitted directly to the agency within 60 days after receipt of the decision.

The protest is sustained.

Anthony H. Gamboa
General Counsel