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Comptroller General
of the United States

United States Government Accountability Office
Washington, DC 20548

Decision

Matter of: Vaden Industries, Inc.

File: B-299338

Date: March 5, 2007

Len Vaden, for the protester.

Alton E. Woods, Esq., and Emily E. Parkhurst, Esq., Department of the Interior, for the agency.

Jonathan L. Kang, Esq., and Glenn G. Wolcott, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging solicitation performance and payment bond requirements is denied where agency's need for such requirements is reasonably supported by the record.

DECISION

Vaden Industries, Inc. protests the terms of request for proposals (RFP) No. N8147070010, issued by the Department of the Interior, National Park Service (NPS), for facility maintenance services on Alcatraz Island. The protester contends that the RFP's requirements for performance and payment bonds violate the Federal Acquisition Regulation (FAR), and result in an unreasonable limit on the scope of the competition.

We deny the protest.

The NPS administers Alcatraz Island, a 12-acre island in the San Francisco Bay whose former uses include a lighthouse, a military base, and a federal prison, and which is now part of the Golden Gate National Recreation Area. The Island is open to the public and receives over 1.3 million visitors per year, with daily visits often exceeding 5,000 persons per day. Access to the Island for visitors and the approximately 50-85 government and contractor staff who work on the Island on a daily basis is provided by boats.

The RFP contemplates award of a fixed-price contract, with a 1-year base performance period and four 1-year option periods. The RFP sought proposals to

provide personnel, equipment, tools, materials, supplies, supervision, and other items and services necessary to perform facility maintenance services on the Island. The contractor will be required to maintain restrooms, waste handling and sewage systems including off-island removal/delivery, fire suppression systems, electrical generation systems, and drinking water systems, and provide fuel delivery.

As relevant here, the successful offeror will be required to provide the government prior to contract performance a performance bond equal to 100 percent of the contract value, and a payment bond equal to 100 percent of the contract value. Additionally, offerors are required to submit with their proposals a bid guarantee equal to the lesser of 25 percent of the proposed price or \$1 million.

The protester primarily challenges the solicitation's requirement for the payment and performance bonds.¹ An agency has the discretion to impose bond requirements for non-construction contracts in appropriate circumstances as a necessary and proper means to secure fulfillment of the contractor's obligations. See FAR §§ 28.103-2, 28.103-3. In reviewing the bond requirements contained in a particular solicitation, we look only to see if they are reasonably imposed. NVT Techs., Inc., B-292302.3, Oct. 20, 2003, 2003 CPD ¶ 192 at 4.

Specifically, the protester contends that the FAR does not permit the agency to impose the bond requirements identified in the solicitation under the circumstances of this procurement. The FAR states that "[g]enerally, agencies shall not require performance and payment bonds for other than construction contracts. However, performance and payment bonds may be used as permitted in 28.103-2 and 28.103-3." FAR § 28.103-1(a). The FAR provides the following guidance for use of performance bonds in non-construction contracts:

(a) Performance bonds may be required for contracts exceeding the simplified acquisition threshold when necessary to protect the Government's interest. The following situations may warrant a performance bond:

(1) Government property or funds are to be provided to the contractor for use in performing the contract or as partial compensation (as in retention of salvaged material).

¹ The protester also challenges the bid guarantee requirement. The protester, however, does not set forth a specific challenge to the bid guarantee, aside from arguing that the cumulative effects of the bid guarantee and performance and payment bonds may unreasonably limit competition. As discussed below, we find no basis to sustain any of the protester's challenges to the solicitation.

(2) A contractor sells assets to or merges with another concern, and the Government, after recognizing the latter concern as the successor in interest, desires assurance that it is financially capable.

(3) Substantial progress payments are made before delivery of end items starts.

(4) Contracts are for dismantling, demolition, or removal of improvements.

FAR § 28.103-2.

Additionally, FAR § 28.103-3 requires a payment bond when a contract requires a performance bond, and the use of a payment bond is in the government's interest.

The protester argues that FAR § 28.103-2(a) limits agencies' use of performance bonds to the four cited examples that "may" warrant use of performance and payment bonds. Here, the agency acknowledges that "none of the 4 examples provided are applicable to this acquisition." Contracting Officer's Statement at 4. Our Office, however, has recognized that the four examples are a non-exclusive list and there may be other circumstances where the requirement is reasonable. Apex Support Servs., Inc., B-288936, B-288936.2, Dec. 12, 2001, 2001 CPD ¶ 202 at 2; see also RCI Mgmt., Inc., B-228225, Dec. 30, 1987, 87-2 CPD ¶ 642 at 2.

The agency states that the bond requirements are necessary for the following reasons:

As a result of its location, Alcatraz Island is deemed to be a remote site, and as such, delivery of services in an efficient, uninterrupted manner is of great importance, both for staff on the Island and for the visiting public. The maintenance and operation of adequate sanitation facilities, the drinking water system, and the electrical system is extremely critical, and may not be allowed to lapse. Prior to issuance of the current solicitation . . . a determination to require performance and payment bonds was made in an effort to protect the government's interest in assuring efficient and uninterrupted service in the event the selected contractor experienced difficulties.

Contracting Officer's Statement at 4-5.

An agency's reasonable determination that obtaining uninterrupted services is necessary to ensure continuing operations is a sufficient basis for requirement of performance and payment bonds. TLC Servs., Inc., B-255758, Mar. 28, 1994, 94-1 CPD ¶ 217 at 4. Here, the protester has not identified a reasonable basis to challenge the agency's determination that a performance bond was required to protect the government's interests.

The protester next challenges the amount of the bond requirements, arguing that 100% bond requirements are neither in good faith nor in the best interest of the government. There is, however, nothing inherently unreasonable regarding a 100% performance bond. NVT Techs., Inc., supra, at 5. As discussed above, the agency has reasonably identified its rationale for the bond requirements.

Finally, the protester argues that the bond requirements will limit competition because Vaden, a small business, will not be able to meet those requirements. As our Office has held, however, the fact that a bond requirement may limit competition and even effectively preclude some small businesses from submitting proposals, does not, on its own, render a bond requirement improper.² Id.

The protest is denied.

Gary L. Kepplinger
General Counsel

² We note that this procurement was not restricted to small business offerors.