

Protest of ) Date: July 20, 1990  
INS CONSTRUCTION & DEVELOPMENT CORP. )  
Solicitation No. 109320-90-A-0001 ) P.S. Protest No. 90-17

### DECISION

INS Construction & Development Corp. ("INS") timely protests the terms of Solicitation No. 109320-90-A-0001, for construction at the Postal Service Headquarters Facility in Washington, DC. INS claims that the solicitation's performance bond requirement is unfair and unduly burdensome for small contractors who wish to do business with the Postal Service.

A request for sealed offers for an indefinite quantity construction contract,<sup>1/</sup> involving general construction work at the Postal Service's Headquarters Facility, was issued by the Facilities Contracting Division on January 25, 1990, with an offer due date of March 9. The contract guarantees a minimum of \$10,000 of work and places a ceiling for aggregate work orders of \$1,000,000.<sup>1/</sup> The solicitation required the successful offeror to submit a performance bond for 100% of the maximum contract amount and a payment bond for 40% of that amount.

Ten offers were received in response to the solicitation. No offer was received from INS. Instead, INS submitted a protest to the contracting officer on March 9, dated March 8, regarding the bonding requirements of the solicitation.

In its protest, INS objects to the amount of the performance bond, asserting that "the conditions placed on this contract are unfair and tantamounts [sic] to close the doors on small businesses who wish to do business with the government." INS requests that the

<sup>1/</sup>Procurement Manual (PM) 11.5.3 a. explains that indefinite quantity construction contracts are used to effect "[m]inor repairs and alterations at one or more Postal facilities....These contracts permit a large number of projects to be accomplished through work orders against a single contract rather than through individual solicitations."

<sup>2/</sup>On February 22, several offerors met with postal officials at a preproposal conference. INS attended this conference and raised questions about the contract's bonding requirements. At that time, postal officials explained that, while only \$10,000 was guaranteed to the awardee, "based on our experience and our projected needs, this contract will most likely go through the \$1,000,000.00."

performance bond requirement be amended.

The contracting officer denied INS's protest as being obviously without merit by letter dated March 22. Award was subsequently made to the low offeror on March 29.

By letter dated April 5, INS appealed the contracting officer's finding. In this letter, INS disagrees with the contracting officer's determination and reiterates the arguments advanced in its earlier protest. INS also argues that, although the performance bond requirement may be in accordance with the Postal Service's procurement regulations, "those regulations never envisaged a possibility of a guaranteed amount ... being as low as 1% of the contract amount." On April 11, the contracting officer forwarded INS's protest to this office for resolution.

In accordance with PM 4.5.7 e., the contracting officer issued a report. The contracting officer states that the bonding requirements for the solicitation are in accordance with the PM, specifically Section 7.1.3 (Performance Bonds) and Section 7.1.4 (Payment Bonds).<sup>1/</sup> The contracting officer asserts that these requirements "are in no way unusual or unduly harsh." The contracting officer notes that although the applicable PM regulations permit him to waive the bond requirements when a determination is made that the interest of the Postal Service can be adequately protected, such a determination was not made in the instant case.

The contracting officer further asserts that the present bonding requirements are typical of an indefinite quantity construction contract, and have not deterred small and minority businesses from participating in this solicitation. Finally, the contracting officer states that bonding costs are determined by a contractor's arrangements with its surety, not by the Postal Service. As to the protester's criticism that its bonding costs might exceed the \$10,000 minimum contract amount, the contracting officer notes that typical surety practice allows for a refund of bonding fees proportionate to the monetary amount of work not performed by the contractor.

The protester responded to the contracting officer's report. INS again emphasizes its belief in the unfairness of the PM's bonding requirements and asserts that the Small Business Administration and certain postal officials agree with its position on bonding levels. INS also disputes the contracting officer's understanding of the refunding of bond fees by sureties, and notes that, in any event, such a refund would only materialize after two or three years, with no interest earned on the money expended. The protester seeks readvertisement of the contract and a limitation on bonding requirements to "order value" or "some reasonable estimate of work" that will be performed.

<sup>3/</sup>PM 7.1.3 a.2. states: "[t]he penal amount of a performance bond must equal 100 percent of the contract price, unless the contracting officer determines that a lesser percentage would adequately protect the Postal Service." PM 7.1.4 a.2. states: "[t]he penal amount of a payment bond must equal . . . 50 percent of the contract price when the contract price is not more than \$1,000,000 . . . ."

## Discussion

As noted above, the PM clearly requires a construction performance bond in the full amount of the contract price. This office has interpreted similar bond requirements strictly in the past. See The Enterprise Corporation, P.S. Protest No. 85-24, July 3, 1985; Tompkins and Associates, P.S. Protest No. 88-58, December 30, 1988; Sensory Electronics, P.S. Protest No. 87-124, January 21, 1988. Because of the important protection which bonds provide the Postal Service and laborers and material men in the event of contractor abandonment or gross default, a contracting officer cannot consider waiving or lessening the bond requirement merely for potential economic benefit:

Neither a bidder's willingness to perform at the offered price nor apparent cost savings which would result from the acceptance of the affected bid, provide a basis for accepting an offer accompanied by an insufficient [bond] guarantee . . . .

Bicklestone Construction Corporation, P.S. Protest No. 82-1, February 5, 1982.<sup>1/</sup>

PM 7.1.3 a.2. does allow a contracting officer to lower the bond amount if he or she "determines that a lesser percentage would adequately protect the Postal Service." As the contracting officer has pointed out, no such determination was made in this instance. The protester claims such inaction by the contracting officer has served to restrict competition and disallow smaller, minority contractors from bidding on this solicitation. The Comptroller General, while considering such allegations, has justified the use of bonds in government contracts:

Performance and payment bonds, although they may result in restriction of competition, are a necessary and proper means of providing to the government fulfillment of a contractor's obligations under his contract . . . .

In reviewing a challenge to the imposition of a bonding requirement, we look to see if the requirement is reasonable and imposed in good faith; the protester bears the burden of establishing unreasonableness and bad faith.

Professional Window and Housecleaning, Inc., Comp. Gen. Dec. No. B-224187, January 23, 1987, 87-1 CPD & 84 (citations omitted), quoted in Good Food Service, Inc., P.S. Protest No. 88-21, April 8, 1988.

In Alta Construction Company, P.S. Protest No. 86-62, October 2, 1986, this office reviewed a challenge to a solicitation's performance bond requirement in circumstances very similar to the present protest. As here, the protester decried the cost of providing a required performance bond for the maximum contract price because of the risk of receiving only the minimum guaranteed amount of work under the contract. In denying

<sup>4/</sup>Bicklestone involved a bid bond, an instrument which guarantees payment for increased government costs in the event an awardee declines to execute and begin work under the contract, and a new contractor must be designated. As with performance bonds and payment bonds, the bid bond's purpose is to protect the Postal Service's financial interests against unforeseen difficulties caused by contractors.

the protest, we noted that incurring bond costs is one of the risks a contractor must undertake in attempting to obtain government projects:

Alta points to nothing unreasonable about the requirement of a performance bond in the maximum amount of the contract . . . . It is appropriate for bidders, in formulating their bids, to consider, among many other factors, the cost of obtaining required bonds and the likelihood that the Postal Service will call for less than the maximum amount of work . . . .

Alta has failed to demonstrate that the contracting officer has improperly determined the minimum needs of the Postal Service. Such determinations will not be reversed unless they are arbitrary or unreasonable.

Id. (citations omitted).

For this solicitation, the contracting officer determined that bonding in the maximum contract amount was necessary. Such determinations are entitled to a "presumption of correctness" which a protester must overcome by evidence of arbitrariness or bad faith. See Daniel J. Keating Construction Company, P.S. Protest No. 89-92, March 1, 1990; Southern Air Transport, P.S. Protest No. 89-56, October 3, 1986; Data Flow Corporation, P.S. Protest No. 83-54, October 28, 1983. The protester has not overcome this burden. INS argues, with no evidentiary support, only that the drafters of the PM could not have intended maximum bonding to apply in this situation. We uphold the contracting officer's decision and deny the protest.

To the extent that the protester questions the PM requirement itself, this presents a policy question over which this office clearly has no jurisdiction. "Although the protester disfavors the methods chosen by the Postal Service for its procurements, the bid protest procedure is not an appropriate forum to challenge them." BWN Contracting Co., Inc., P.S. Protest Nos. 89-38, 89-50, and 89-57, August 31, 1989.

The protest is denied.

William J. Jones  
Associate General Counsel  
Office of Contracts and Property Law

**[checked against original JLS 6/2/93]**