



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Roger L. Herbst  
**File:** B-244773  
**Date:** November 19, 1991

Roger L. Herbst for the protester.  
Allen W. Smith, Forest Service, Department of Agriculture,  
for the agency.  
John Formica, Esq., and James A. Spangenberg, Esq., Office  
of the General Counsel, GAO, participated in the preparation  
of the decision.

### DIGEST

Agency reasonably required bid and performance guarantee requirements in a solicitation for tree thinning services based on regional Forest Service policy mandating such bonds on labor intensive contracts because of apparent adverse past performance, including labor liens received against various contractors.

### DECISION

Roger L. Herbst protests the bond requirements in invitation for bids (IFB) No. R6-21-91-84, issued by the Forest Service, Department of Agriculture, for tree thinning services at the Republic Ranger District, Colville National Forest, in the State of Washington.

We deny the protest.

The agency issued the IFB as a 100-percent small business set-aside for a firm, fixed-price contract for tree thinning services in several areas of the forest. The solicitation contained two line items, each with several sub-line items. The IFB provided for multiple awards, and allowed bidders to qualify their bids to limit the total quantities of work for which they might be obligated. The solicitation also allowed the submission of "all or none" bids.

The solicitation contained a clause notifying potential bidders that contractors receiving awards in excess of \$25,000 would have to furnish performance security to guarantee performance in the amount of 20 percent of the total contract price. The solicitation also contained a "Notice of Required Bid Security" clause, requiring that "[i]f a bid exceeds \$25,000, each bidder must submit a bid guarantee in the amount of 20 percent of the total bid price."

The agency states, with regard to including bond requirements in the IFB, that it is Forest Service policy to do so for projects in the Colville Forest and other forests in the region, "which are labor intensive and over 325,000," and that bonds "are used to stimulate performance, to protect the contractor, employees, and supplier's rights and liens, and to facilitate recovery of damages or excess costs in the event of a default termination."

Mr. Herbst protests that the bond requirements in the solicitation are arbitrary, unreasonable, and restrict competition, and should either be eliminated in their entirety or made applicable to all bidders regardless of whether their bids are greater or less than \$25,000.

We disagree. Although bond requirements may result in the restriction of competition, when used in appropriate circumstances they can be a necessary and proper means of securing to the government the fulfillment of the contractor's obligations. J&J Maint., Inc., B-239035, July 16, 1990, 90-2 CPD ¶ 35. Federal Acquisition Regulation (FAR) section 28.103-1(a) provides that "[g]enerally, agencies shall not require performance . . . bonds for other than construction contracts."<sup>1</sup> However, the FAR permits the use of bond requirements in every situation where they are needed to protect the government's interests. RCI Mgmt., Inc., B-228225, Dec. 30, 1987, 87-2 CPD ¶ 642. In reviewing the bond requirements contained in a particular solicitation, we look only to see if they are reasonable and imposed in good faith. Taina U.S. Inc., B-240892, Dec. 21, 1990, 90-2 CPD ¶ 517.

Here, the Forest Service included the performance bond requirement in the solicitations because of a regional policy requiring the imposition of performance bonds in labor intensive reforestation/forestation type contracts in excess of \$25,000, including tree thinning contracts. The general reasons underlying this policy determination are to stimulate performance; protect the rights of contractors, suppliers, and employees; and facilitate the recovery of damages or excess costs in the event of a default termination. This policy with regard to labor intensive contracts in regional forests was implemented in 1987, following a study by regional contracting personnel, and according to the agency, the policy was based on adverse past performance, including labor liens received against

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<sup>1</sup>An award under the solicitation here, which contains a Service Contract Act wage determination, will clearly result in a services contract for tree thinning services, rather than a construction contract. See 29 C.F.R. § 4.103(a) (1991).

various contractors in the regional national forests.<sup>2</sup> The Forest Service asserts that competition has not been adversely affected and that performance in this area has improved.

Even though Mr. Herbst asserts that he and his partner would not employ other persons to perform this work as they perform it themselves, nothing in the solicitation would preclude a contractor from employing workers. Based on the foregoing, we find the Forest Service could reasonably impose a performance bond requirement. Since a performance bond could reasonably be required on this IFB, a bid guarantee could also be required. See FAR § 28.101-1(a).

Mr. Herbst, however, protests that the \$25,000 threshold on the requirement of such bonds is irrational and discriminatory against small businesses. This threshold is expressly authorized by the Department of Agriculture Acquisition Regulation (AGAR), 48 C.F.R. §§ 428.102-3(b), 452.228-70, 452.228-71 (1990). Under the AGAR, where a bid guarantee or a performance bond is required for a particular solicitation, they are only required if the bid or contract exceeds \$25,000; the regulation does not authorize such bonds for bids or contracts under \$25,000. Given that all bidders on this small-business set-aside will bid to the same bonding requirements and have been apprised of the \$25,000 thresholds, we fail to see how this faithful implementation of the AGAR unfairly discriminates against any particular class of small business bidders.

The protest is denied.

  
James Hinchman  
General Counsel

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<sup>2</sup>While it is true that a payment bond can be used to assure employees are paid under the contract, the Forest Service correctly notes that such employees are also covered by performance bonds. 29 C.F.R. § 4.187(g).