



DECISION

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-195838

DATE: December 18, 1979

MATTER OF: Technical Services Corporation P.3506

DIGEST:

1. Decision made by contracting officer pursuant to DAR § 10-104.2(a) (1976 ed.) that bonding requirements are necessary in procurement for maintenance of Government-owned transportation equipment was reasonable to protect Government from financial loss.
2. Record does not support contention that bonding requirements were imposed as substitute for contractor responsibility determination.

Technical Services Corporation (TSC) protests the requirements for bid, performance and payment bonds in invitations for bids (IFB) N62467-79-B-2926 (formerly N62467-79-B-2913 and 2916) and N62467-79-B-2293. TSC contends that the bond requirements are being used as a substitute for a determination of contractor responsibility, contrary to the requirements of Defense Acquisition Regulation (DAR) § 10-104.2 (1976 ed.) which states:

"Performance bonds shall not be used as a substitute for determination of contractor responsibility as required by Section I, Part 9 * * *."

The instant IFB's are for necessary services to maintain and operate Government-owned transportation equipment. TSC argues that the contracting officer's decision to require a performance bond effectively limits participation in the bidding to a select few firms and that a proper analysis of bonding requirements was never made. TSC states that the contracting officer is equating the financial ability to obtain a \$2 million penal performance bond with a responsibility determination and that the bond requirements for these service contracts are prejudicial to small business concerns.

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Regarding the contracting officer's authority to require bonds, DAR § 10-104.2(a) provides "* * * performance bonds may be required in individual procurements when the contracting officer determines a need therefor" and that justification for the bond requirements must be fully documented. DAR § 10-104.2(a) also states:

- "(i) When the terms of the contract provide for the contractor to have the use of Government material, property or funds and further provide for the handling thereof by the contractor in a specified manner, a performance bond shall be required if needed to protect the Government's interests therein.
- "(ii) When the circumstances applicable to a particular procurement are such that for financial reasons a performance bond is necessary to protect the interests of the Government, a performance bond shall be required."

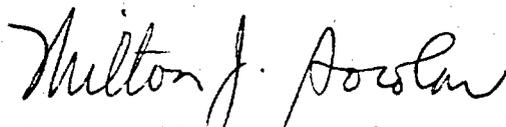
The record includes the contracting officer's written determination in support of his decision regarding the bonding requirements. Under the terms of the contracts, the contractor is to have the use of Government materials and property. The contracting officer's determination indicates that the risk of nonperformance and the consequences of curtailing operations while pursuing alternate means of maintaining the equipment is so great that a bond requirement will help to minimize any period of shutdown, nonperformance, or contractor default.

2/ The Navy states that although it is difficult to place a specific dollar value on the financial burden the Government would suffer if the contractor fails to perform, it is conservatively estimated that due to the replacement plant value in the \$4 million range, costs to the Government could be in the \$300,000 to \$400,000 range. Based upon the potential financial

damage to the Government, and the impact on the Navy's ability to perform its work if the contractor fails to perform required motor vehicle maintenance functions, the contracting officer considered it in the Government's best interest to include bid, performance and payment bond requirements in the IFB's.

We have recognized that it is within the contracting officer's discretion to determine whether a need exists for bonding requirements. Abbott Power Corporation and United Power, B-183847, October 2, 1975, 75-2 CPD 207. See also B-178371, August 17, 1973. In this connection we look to whether the determination was made in good faith with a reasonable basis. It is the protester's burden to demonstrate that such a decision is unreasonable or arbitrary. Reliable Maintenance Service, Inc.-- request for reconsideration, B-185103, May 24, 1976, 76-1 CPD 337. In our opinion, the Navy has made a convincing case to justify the imposition of bonding requirements because of the potential financial damage to the Government and the impact on the Navy's ability to perform its work if the contractor fails to perform required motor vehicle maintenance functions. In these circumstances, we believe the bonding requirements are reasonably imposed and are not a substitute for a determination of bidder responsibility.

Accordingly, the protest is denied.



For The Comptroller General
of the United States