



**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: International Technology Corporation

File: B-238646

Date: June 8, 1990

Robert E. Little, Jr., Esq., Porter, Wright, Morris, & Arthur, for the protester.
Georgianne Riley, Esq., for Chemical Waste Management, Inc., an interested party.
Lester Edelman, Esq., Office of the Chief Counsel, Department of the Army, for the agency.
George Ruppert, Esq., David Ashen, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Performance bond requirement is unobjectionable where agency determines bond is necessary to assure continuous operation of process of excavation and incineration of contaminated soils, the interruption of which may result in contamination of surrounding area, and substantial progress payments will be made prior to completion of performance.

DECISION

International Technology Corporation (ITC) protests the requirement for a performance bond in request for proposals (RFP) No. DACA41-90-R-0004, issued by the Army Corps of Engineers for the construction of a transportable incineration system for explosives-contaminated soils at the Savanna Army Depot Activity (SADA), Illinois, and at the Alabama Army Ammunition plant (AAP).

We deny the protest.

The work under the RFP consists of three phases: phase I, which includes satisfying regulatory requirements and undertaking preparatory work for construction activities; phase II, covering excavation, transportation, handling, incineration, and disposal of contaminated soil and treatment of explosives-contaminated water; and phase III (optional), which includes the separation, transportation,

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incineration, and disposal of stockpiled explosives-contaminated soil debris. As amended, the RFP classified the phase I work as services, the operation of the incinerator and transportation and disposition of materials as services, and all remaining phase II and III work as either building construction or heavy construction. For phases II and III, the RFP required a performance bond equal to 100 percent of the phase II and III price. The Corps imposed a 100 percent performance bonding requirement apparently because it considered a substantial amount of the work to be construction work under the Miller Act, 40 U.S.C. § 270a-270k (1988), which generally requires that the awardee furnish performance and payment bonds for contracts, exceeding \$25,000 in amount, "for the construction, alteration, or repair of any public building or public work of the United States." In this regard, the Army has pointed to Federal Acquisition Regulation (FAR) § 36.102, which defines construction to include the excavation of real property, and the Office of Management and Budget's Standard Industrial Classification manual, which classifies earth moving not connected with building as heavy construction and excavation as construction; the agency notes that contaminated soil will be excavated at the SADA site and the configuration of both sites will be altered. The agency has further pointed out that temporary water treatment, incineration and handling facilities, as well as access roads, will be built at both sites.

ITC argues that only a small amount of the actual work involved is for construction and that the agency should not have imposed a 100 percent bonding requirement for the non-construction portion of the work. Furthermore, ITC contends that even the limited amount of construction involved generally is not construction or alteration with respect to a "public building or public work of the United States," as that phrase is used in the Miller Act. 40 U.S.C. § 270a(a). (ITC concedes that some small portion of the work, that is, the filling in of several lagoons at the SADA site, amounts to alteration of a public work.)

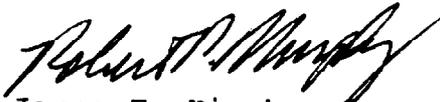
Although requiring bonding may in some circumstances restrict competition, it nevertheless can be a proper means of securing to the government fulfillment of a contractor's obligations in appropriate circumstances. See Commercial Energies, Inc., B-238208, Apr. 5, 1990, 90-1 CPD ¶ ____; IBI Sec., Inc., B-235857, Sept. 27, 1989, 89-2 CPD ¶ 277. In reviewing a challenge to the imposition of a bonding requirement, we look to see if the requirement is reasonable and was imposed in good faith; the protester bears the burden of establishing unreasonableness or bad faith. Id.

We find that the Army reasonably imposed the bonding requirement. Whether or not the substantial alteration of the sites and construction of temporary facilities will amount to alteration or construction of a public work under the Miller Act, in our view it is clear that the work otherwise is subject to imposition of a bonding requirement. First, the FAR specifically provides that a performance bond may be appropriate for nonconstruction contracts where, as here, the agency determines that it is necessary to protect the government's interest because substantial progress payments will be made prior to completion of the work. FAR § 28.103-2(a)(3). Furthermore, bonds may be required where the continuous operation of critically needed services is absolutely necessary. See Intermodal Management, Ltd., B-234108, Apr. 20, 1989, 89-1 CPD ¶ 394 (operation of medical center warehouse); RCI Management Inc., B-228225, Dec. 30, 1987, 87-2 CPD ¶ 642 (maintenance and repair of family housing units). The Army considered the continuous and smooth functioning of the soil decontamination were necessary here. Specifically, the agency reports that a stoppage in the incineration process may result in the stockpiling of contaminated soil in a holding area that is not designed to contain continuously stockpiled materials; delay in moving contaminated soils through the stockpile holding area increases the potential risk that areas outside the holding area will become contaminated due to rain water runoff and possible leaching of the contaminants into the ground. The Army maintains it is essential to have continuous operation of the incineration services to safeguard against these risks. We find that this rationale, as well as the making of progress payments, is a legitimate basis for imposing the bonding requirement.

Although ITC also questions the amount of the required bond, FAR § 28.102-2(a)(1) specifically provides that the penal amount of the performance bond shall be 100 percent of the original contract price, unless the contracting officer determines that a lesser amount would be adequate to protect the government. Here, the agency excluded the services under phase I of the contract effort, but determined that a bond amounting to 100 percent of the price for the remainder of the work was necessary to protect the

government's interest. This is consistent with the FAR, and we find nothing inherently unreasonable in requiring bonding in this amount.

The protest is denied.


for James F. Hinchman
General Counsel