



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: LBM Inc.

File: B-249886

Date: October 9, 1992

Frank Moody for the protester
Marilyn Walter Johnson, Esq., and Paul M. Fisher, Esq.,
Department of the Navy, for the agency.
Jacqueline Maeder, Esq., and Paul Lieberman, Esq., Office of
the General Counsel, GAO, participated in the preparation of
the decision.

DIGEST

Agency reasonably included bid guarantee requirement in invitation for bids (IFB) for maintenance and repair/replacement services of military family housing where the work specified included construction in excess of \$25,000, and agency reasonably determined that performance and payment bonding was necessary to ensure that its need for continuous operations would be satisfied.

DECISION

LBM Inc. protests the bid, performance and payment bond requirements in invitation for bids (IFB) No. N62467-92-B-4571, issued by the Department of the Navy for maintenance and construction of family housing units.

We deny the protest.

The solicitation, issued on August 3, 1992, contemplates the award of a combination firm, fixed-price and indefinite-quantity contract for the performance of maintenance and repair/replacement of all government-owned family housing units at the Memphis Naval Air Station, Millington, Tennessee, for a 5-year period. The solicitation requires a bid guarantee in the form of a bid bond equal to 20 percent of the total bid for the fixed-price work and 20 percent of the guaranteed minimum of the indefinite-quantity work.¹

¹The IFB specified that the minimum indefinite-quantity work to be ordered is \$50,000.

The bid bond is to ensure the execution by the awardee, within 10 days of award, of the performance and payment bonds specified for both the fixed-price and the indefinite-quantity work.

The agency determined that performance and payment bonds are necessary to prevent a break in the performance of the maintenance/repair services which "would affect the availability of housing for military personnel and result in a substantial financial loss to the government." Further, the agency states that the majority of the work specified in the solicitation is major trade construction work with a value exceeding \$25,000, hence the Miller Act (40 U.S.C. § 270a-270f (1988)) mandates the use of performance and payment bonds. Federal Acquisition Regulation (FAR) § 28.101-1(a) calls for a bid guarantee where performance and payment bonds are required.

LBM argues that the bonding requirements are unreasonable because the family housing maintenance services have been under contract for 10 years without a break in service. The protester also posits that the majority of the work required under the contract is service work and therefore bonding should not be required since FAR § 28.103-1 states that "[g]enerally, agencies shall not require performance and payment bonds for other than construction contracts." Nonetheless, as LBM itself notes, line item 3 of the IFB is for an indefinite quantity of construction work subject to Davis-Bacon wage rates, which has a guaranteed minimum value of \$50,000 under the IFB.² Thus, bonding requirements are called for under the Miller Act. See FAR § 28-102-1(a). Moreover, although, as a general rule, in the case of nonconstruction contracts, agencies are admonished against the use of bonding requirements, FAR § 28.103-1(a), and a requirement for performance bonds may restrict competition, bonding may be necessary in some cases to secure fulfillment of a contractor's obligations to the government. Commercial Energies, Inc., B-238208, Apr. 5, 1990, 90-1 CPD ¶ 368. A payment bond and a bid guarantee may be required by the

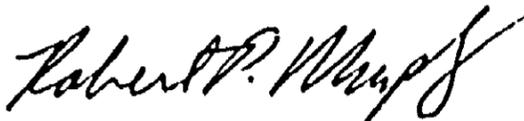
²Construction is defined to include painting, alteration, and improvements to all types of buildings, structures or other real property. See FAR § 36.102. Here, line item 3 is for construction for purposes of the applicability of the Miller Act, as it includes, among other things, the repair (including the installation of drywall, gypsum board, vinyl and cultured marble panels) of walls, ceilings and floors and interior and exterior house painting.

contracting activity where a performance bond is required. FAR §§ 28.101-1 and 28.103-3. We will not disturb a contracting officer's determination that bonding is necessary unless it is shown to be unreasonable. Id.

Here, the Navy reasonably imposed the bonding requirements; a determination by the contracting officer that continuous operations are necessary constitutes a sufficient basis for requiring a performance bond. International Technology Corp., B-238646, June 8, 1990 90-1 CPD ¶ 544; IBI Sec., Inc., B-235857, Sept. 27, 1989, 89-2 CPD ¶ 277; RCI Mgmt., Inc., B-228225, Dec. 30, 1987, 87-2 CPD ¶ 642. Bonding requirements are permissible in such circumstances even though the continuing operations rationale does not fall within the four situations articulated in FAR § 28.103-2(a) as warranting bonding; those situations are examples and do not preclude an agency from requiring bonds in other appropriate circumstances, such as those here. Commercial Energies, Inc., supra.

While LBM argues that the determination to require bonding is unreasonable because the services have not been interrupted in 10 years, there is no requirement that there be a history of performance problems before performance bonds may be required. Areawide Servs., Inc., B-225253, Feb. 9, 1987, 87-1 CPD ¶ 138. Accordingly, we find no basis to object to the IFB's bonding requirements.

The protest is denied.


for James F. Hinchman
General Counsel