



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

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B-178530; B-178602; B-178606; B-178701

JUL 23 1973

Jets Services, Inc.
2721 Park Street
Jacksonville, Florida 32205

Attention: Mr. Thomas F. Gibbs
Vice President

Gentlemen:

Reference is made to your letter of June 19, 1973, and prior correspondence, concerning your protest against alleged excessive bonding requirements under Department of the Air Force invitations for bids (IFB) Nos. F09607-73-B-0095, F09650-73-E-0525, F11602-73-B-0638 and F05600-73-B-0387, issued by Moody Air Force Base, Georgia, Robins Air Force Base, Georgia, Chamate Air Force Base, Illinois, and Lowry Air Force Base, Colorado, respectively. The Air Force has advised our Office that it found it necessary to make awards under the subject invitations prior to the resolution of your protests by our Office.

Each of the subject invitations covered the procurement of food handling services which were set aside for small business and each invitation contained requirements for a 20-percent bid bond, 100-percent performance bond and a 50-percent payment bond. It is reported that on May 2, 1973, the respective contracting officers reevaluated the performance and payment bond requirements set forth in the cited invitations and they subsequently determined that such requirements could be reduced to penal amounts of 25 percent for the performance bond and 25 percent for the payment bond.

You contend that the bonding requirements in the invitations in question are excessive. You maintain that for service contracts, the penal amounts should be as follows: 10 percent for bid and performance bonds, and a penal sum not in excess of 5 percent for payment bonds. You state that your firm, as well as other small business competitors, enters perhaps 15 bids in order to get one or two awards and because of this need for a multiplicity of almost simultaneous offers, and the fact that the bond underwriter appraises the total of the penal sums of all extant bonds against the net worth of the

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bonded company, an impasse is created for most small businesses which have exhausted their bonding capacity. You indicate that the central point of your argument, in all of your protests, is simply that pursuant to the provisions of paragraph 10-104 of the Armed Services Procurement Regulation (ASPR) performance and payment bonds should not be required unless they are essential for the Government's interests and, then, if bonding is required, the contracting officer's justification for the bonding must be fully documented.

You maintain that in most cases, particularly kitchen police services, it would be extremely difficult to detail and prove any out-of-pocket loss to the Government even in the event of total non-performance by a contractor and, therefore, there should normally be no bonding required. In the case of a full food service contract, you assert that a 10-percent performance bonding would more than cover any reasonably conceivable loss to the Government. You request that our Office advise the Department of Defense to abide by the letter and intent of ASPR with the specific suggestion that under normal circumstances kitchen police service contracts should carry no bonding, and full food service contracts no more than 10-percent performance bonding unless the contracting officer can specifically document and justify the need for greater bonding due to abnormal or extraordinary circumstances. You point out that ASPR 10-104.1 stipulates that "performance and payment bonds shall not be required unless * * * the requirement of such bonds is in the interest of the Government and not prejudicial to other bidders or offerors." You contend that bonding of the magnitude specified in the subject invitations is contrary to the interest of the Government in that it serves no useful purpose and results in higher prices to the Government due to substantial bonding costs.

ASPR 10-102.3(a) provides that whenever a bid guarantee is deemed necessary, the contracting officer shall determine the percentage (or amount) which, in his best judgment, when applied to the bid price, will produce a bid guarantee amount adequate to protect the Government from loss should the successful bidder fail to execute such further contractual documents and bonds as may be required. It also provides that the percentage determined shall not be less than 20 percent of the bid price except that the maximum amount required shall be \$3,000,000. Since each of the invitations specified a bid bond of 20 percent, it appears that the requirements of ASPR 10-102.3(a) have been met.

ASPR 10-104.2 provides that performance bonds may be required for other than construction contracts when " * * * the contracting

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officer determines the need therefor." That paragraph further provides that performance bonds shall not be used as a substitute for determinations of contractor responsibility. ASPR 10-104.2(a)(1) states that where 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.

We have recognized that a determination regarding such a requirement is within the contracting officer's discretion. B-170067, April 23, 1971. We have also stated that while "the requirement for a performance bond may in some circumstances result in a restriction of competition, it is nevertheless a necessary and proper means of securing to the Government fulfillment of a contractor's obligations under his contract." B-175458(2), June 20, 1972. In that case we rejected the argument that a 100-percent performance bond requirement was unreasonable because it was difficult for a small business firm to comply with it or that the requirement must have been included in a solicitation to favor a particular firm because prior solicitations did not contain such a requirement.

ASPR 10-104.3 provides that, generally, payment bonds for contracts other than construction may be required only if a performance bond is also required. It also provides that if a performance bond is required, a payment bond should also be required if it can be obtained at no additional cost.

The record indicates that by a letter dated September 11, 1972, to our Office, with a copy to the Small Business Administration (SBA), you lodged a generalized protest against use of "excessive bonding requirements" by numerous contracting offices, in the Army and Air Force. As indicated in our letter of November 3, 1972, to your firm, at the request of SBA, the Air Force conducted a study as to the bonding policies employed by some 77 Air Force Bases for other than construction procurements under ASPR 10-104. In a Position Paper dated January 15, 1973, a copy of which was furnished to your firm, the Air Force states that your allegations of last year that excessive bonding requirements had been practiced by numerous contracting officers in the Air Force were not supportable. It is pointed out in the Position Paper that for fiscal year 1972, the data shows there were 56 instances of bonding for three categories of other than construction contracts and that in all 56 contracts, except one, a small business firm was awarded the contract.

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In a letter dated April 24, 1973, to you, SBA advised that it did not concur with the views of the Air Force that bonding requirements on food handling contracts are not excessive, as alleged by your firm, and that SBA had made a recommendation to the ASPR Committee that the ASPR be changed to require the contracting officer to show the approximate dollar value of the Government interests to be protected as well as requiring a documented statement that bonding is not being used as a substitute basis for determining contractor responsibility. The record indicates that at a meeting held on May 30, 1973, the ASPR Committee considered the recommendation of SBA with respect to bonding for service-type contracts with small businesses. The committee was unable to determine the existence of a substantial problem and it was therefore decided to close the case (No. 73-40) without action and to refer the matter to a Procurement Management Review (PMR) Group which is to submit a report on its findings to the committee in approximately one year. In view of the fact that the PMR Group is now studying the matter of which you complain, and there is no concrete evidence to indicate that competition has been adversely affected by the bonding requirements, we do not believe it would be appropriate at this time for our Office to make any recommendations to the Department of Defense.

Accordingly, your protests are denied.

Sincerely yours,

E. H. Morse, Jr.

~~For the~~ Comptroller General
of the United States