

Ruppert



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Commercial Energies, Inc.

File: B-238208

Date: April 5, 1990

Gregory K. Scott, Esq., Moore, Smith & Bryant, for the protester.
Joe W. Crutchfield, for Union Natural Gas Pipeline Company, an interested party.
Vasio Gianulias, Esq., Department of the Navy, for the agency.
George M. Ruppert, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest against performance bond requirement in solicitation is denied where agency required bond to assure a constant supply of natural gas to naval station, and protester does not establish that the determination to require a performance bond was unreasonable.

DECISION

Commercial Energies, Inc. (CEI), protests the performance bond and insurance requirements in invitation for bids (IFB) No. N62467-89-B-0716, issued by the Department of the Navy as a small disadvantaged business (SDB) set-aside, to obtain natural gas for the naval station in Ingleside, Texas.

We deny the protest.

The IFB required the awardee to provide a 5-year performance bond in the amount of 5 percent of the bid price. CEI contends that the bonding requirement is unreasonable because it conflicts with Federal Acquisition Regulation (FAR) § 28.103-2(a), and is impossible to meet, as commercial bond writers are unwilling or unable to write the form of bond requested. CEI also maintains that the IFB does not provide sufficient information to determine the amount and kind of insurance required.

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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. Grace Indus., Inc., B-220606, Dec. 17, 1985, 85-2 CPD ¶ 682. We will not disturb a contracting officer's determination that bonding is necessary unless it is shown to be unreasonable. Id.

We find that the Navy reasonably imposed the bonding requirements. The agency explains that the naval station at Ingleside is a new home port which will support numerous Navy vessels. The first ship is expected to arrive at the station by April 1991 and the remainder of the fleet by June 1991. Eleven necessary buildings therefore must be constructed for the facility by June 1991, and a supply of natural gas is needed to complete this construction. Further, the Navy explains, since natural gas is the only source of fuel for the support facilities, without a continuous supply of natural gas, the station cannot remain functional after construction is completed. The contracting officer thus determined that a performance bond was necessary to ensure a continuous supply of natural gas and the uninterrupted operation of the station.


A determination by the contracting officer that continuous building operations are absolutely necessary is itself a sufficient basis for requiring a performance bond. Aspen Cleaning Corp., B-233983, Mar. 21, 1989, 89-1 CPD ¶ 289. The justification here--that continuous operation of a strategic defense installation is necessary--is analogous and, we find, similarly warrants imposition of a bonding requirement. Bonding requirements are permissible in such circumstances even though the continuing operations rationale does not come 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. See Professional Window and Housecleaning, Inc., B-224187, Jan. 23, 1987, 87-1 CPD ¶ 84. Further, although it may be that CEI will have difficulty obtaining a bond, three other firms have submitted bids without taking exception to the requirement.

CEI argues that the bonding requirements are unreasonable because this is the first time in an SDB set-aside that the Navy has required a performance bond for the delivery of natural gas. CEI asserts further that the Navy has not used similar bonding requirements for open, competitive solicitations. Each procurement, however, stands on its

own; the fact that the Navy's judgment as to the necessity for bonding may have been different under the particular circumstances of other procurements does not establish the unreasonableness of the Navy's imposition of the bonding requirements here, given our conclusion that bonding was justified to ensure continuity of critically important operations. See Govern Serv., Inc., 68 Comp. Gen. 204 (1989), 89-1 CPD ¶ 92.

As for the insurance requirement, the record indicates that amendment 0004, issued after CEI filed its protest with our Office, sets forth the amount and type of insurance coverage the contractor would be required to obtain and maintain during contract performance. In its comments on the agency's report, CEI asserts that this amendment did not cure the deficiencies, but does not specify what deficiency remains. We therefore have no basis for considering this allegation further.

The protest is denied.


James F. Hinchman
General Counsel