



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Maintrac Corporation

File: B-251500

Date: March 22, 1993

Mark A. O'Neill for the protester.
James E. Harvey, for Ogden Allied Eastern States Maintenance Corporation, an interested party.
Robert T. Hoff, Esq., General Services Administration, for the agency.
Peter A. Iannicelli, Esq., and Michael R. Golden, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest that performance bond requirement in request for proposals unduly restricts competition to the prejudice of small business concerns is denied where contracting officer reasonably determined that performance bond is necessary to ensure that contractor will continuously maintain mechanical systems of two government buildings in order to preserve safe and healthful environment for government employees and others doing business in the buildings as well as preventing damage to federal property.

DECISION

Maintrac Corporation protests that the performance bond requirement in request for proposals (RFP) No. GS-01P-92-BWC-0140, issued by the General Services Administration (GSA) for mechanical maintenance services, unduly restricts competition to the prejudice of small business concerns. We deny the protest.

Issued on October 21, 1992, as an unrestricted negotiated competition, the RFP solicits offers to provide mechanical maintenance services at two federal buildings in Boston, Massachusetts, the J.W. McCormack Post Office and Courthouse building and the Captain J.F. Williams United States Coast Guard Federal Building, for a 3-year basic contract period with options for 2 additional years. The contractor will be required to operate, maintain and repair the mechanical and utility systems of both buildings, including the heating, air conditioning, and emergency lighting systems.

The RFP requires the awardee to furnish a performance bond in an amount equal to 20 percent of the contract price for the base term (3 years) of the contract. Maintrac alleges that the performance bond requirement unduly restricts competition, eliminating small business competitors, because surety companies will issue 3-year performance bonds to large businesses but not to small businesses.

Although, as a general rule, contracting agencies are admonished not to require performance and payment bonds in the case of nonconstruction contracts, Federal Acquisition Regulation (FAR) § 28.103-1(a), the regulations permit the use of bonding requirements in cases where they are needed to protect the government's interests. Cobra Technologies, Inc., B-249323, Oct. 30, 1992, 92-2 CPD ¶ 310; D.E.W. Management Servs., Inc., B-246955, Apr. 10, 1992, 92-1 CPD ¶ 358. In reviewing a challenge to the imposition of a bonding requirement as unduly restrictive of competition, we look to see if the contracting officer's determination that bonding is necessary is reasonable and has been made in good faith. Id.

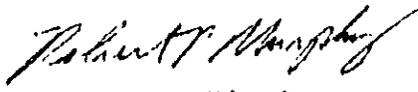
We conclude that the contracting officer reasonably imposed the bonding requirement. The agency explains that the purpose of the performance bond requirement is to ensure that the contractor will continuously maintain the mechanical systems of the two buildings. GSA states that failure to properly and continually maintain the mechanical equipment in the buildings could result in malfunctioning apparatus leading to unsafe and unhealthful environmental conditions for government employees and others doing business in the buildings as well as causing damage to federal property. For example, GSA points out that improperly maintained mechanical equipment resulted in fire damage in government buildings in this geographic area on at least two occasions.

In addition, the agency points out that a prior contractor doing mechanical maintenance work at the Captain J.F. Williams United States Coast Guard Federal Building was terminated for default in early 1992 because of the contractor's failure to perform its contractual obligations. GSA reports that it encountered many costs associated with the reprocurement of mechanical maintenance services and that the utility and safety of the building was compromised. GSA states that this default termination was a factor in deciding to require a 3-year performance bond in the present solicitation.

We have recognized the reasonableness of imposing performance bond requirements where, as here, continuous performance of critically needed services is absolutely

necessary. See Diversified Contract Servs., Inc., B-233620, Feb. 21, 1989, 89-1 CPD ¶ 180, and cases cited therein. Furthermore, we have held that even though a bonding requirement may restrict competition, possibly even to the exclusion of some small business concerns, that possibility alone--without a finding of unreasonableness or bad faith on the part of contracting officials--does not render a bonding requirement improper. Id. Here, Maintrac has not suggested that GSA officials acted in bad faith in imposing the bonding requirement.

The protest is denied.


for James F. Hinchman
General Counsel