

**DECISION**

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

*MYER*  
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**FILE:** B-207982

**DATE:** November 9, 1982

**MATTER OF:** William B. Jolley

**DIGEST:**

1. Protest against scope of work requirement of IFB is untimely when filed after bid opening.
2. Protest that agency included bonding requirements in IFB to subvert A-76 contracting-out program is denied where procurement of facility support services involved providing contractor with large inventory of Government-owned material and nonperformance could result in a significant financial loss to the Government.
3. GAO will consider undated justification, presented in agency report, for purpose of ascertaining whether facts existed justifying agency action. It is not important whether the document was extant at the time the decision was made.

William B. Jolley (Jolley) protests both the scope of work contained in invitation for bids (IFB) No. N62467-82-B-0243 and the Navy's decision to impose bonding requirements. The IFB, for facility support services at the Navy Supply Corps School, Athens, Georgia, was issued by the Naval Facilities Engineering Command, Charleston, South Carolina.

Jolley contends that the Navy used both the scope of the work (coverage of both boilers and swimming pools) and the inclusion of bonding requirements in "a calculated attempt to subvert the A-76 contracting-out program." Jolley believes that the Navy wants to discourage bidding in order to keep the work in-house.

Jolley's protest against the scope of work requirement of the IFB is untimely and will not be considered. Our Bid Protest Procedures require that protest against alleged

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improprieties in any type of solicitation which are apparent prior to bid opening shall be filed prior to bid opening. 4 C.F.R. § 21.1(b)(1) (1982). Jolley first raised the issue of the scope of the IFB in its comments on the agency report of September 3, 1982. Bid opening was July 7, 1982.

On the other hand, Jolley's protest of the inclusion of the bonding requirements, which was filed prior to bid opening, was timely filed and will be considered.

The Navy justifies the requirement for bid, performance and payment bonds on several grounds; however, two grounds appear central to the justification: (1) the contractor will be provided with a large inventory of Government-owned material; and (2) nonperformance by the contractor would result in significant financial loss to the Government. It appears that the services solicited are currently provided by Government employees who would be reassigned in the event that the Navy decided to contract out the services. The location of the facility and the fact that the Navy would no longer have the in-house capability to operate and maintain the facilities and equipment lead the Navy to believe that nonperformance would be costly in terms of increased equipment maintenance and replacement costs and increased equipment operations costs. Moreover, the Navy states:

"It would also effect the cost of military and civilian salaries for unproductive time, the cost of housing station residents on the economy until services were restored, and would interrupt the \* \* \* mission to provide Supply Officers to the fleet."

We have long recognized that the contracting officer has discretion in deciding whether bonding requirements are necessary in a particular procurement. Steamco Janitorial Services, Inc., B-188330, August 2, 1977, 77-2 CPD 69. Where the decision is made in good faith with a reasonable basis, we will interpose no objection. Consequently, it is the protester's burden to show that the decision to include bonding requirements is unreasonable or arbitrary.

In general, the Defense Acquisition Regulation (DAR) provides that bid bonds shall not be required in the absence of a requirement for either a performance bond, or both a performance and a payment bond. DAR § 10-102.2 (1976 ed.), DAC No. 76-20, September 17, 1979. It further provides that, generally, performance and payment bonds shall not be required for nonconstruction contracts. DAR § 10-104.1(b) (1976 ed.), DAC No. 76-18, March 12, 1979. However, where necessary to protect the Government's material, property or funds (DAR § 10-104.2(i) (1976 ed.)), or, where necessary to protect the financial interests of the Government (DAR § 10-104.2(ii) (1976 ed.)), performance bonds may be required on a case-by-case basis, provided that the justification is fully documented. DAR 10-104.2(a) (1976 ed.). Where such a justification is made, DAR directs contracting officers to also require a payment bond if it can be obtained at no additional cost. DAR § 10-104.3 (1976 ed.).

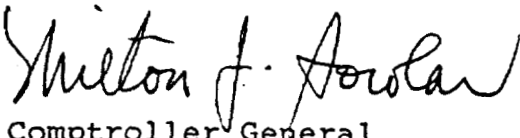
Jolley argues that the form of the Navy's justification is inadequate in that: (1) it is undated; (2) the signature is not identified by rank, organization and position; and (3) "it may well have been prepared solely in response to our complaint." Jolley also contends that it was not furnished the complete Navy report on its protest.

The Navy report to our Office consists of a letter and two enclosures (the IFB and the contracting officer's justification for the bonding requirements). Jolley was furnished the letter and the justification. Jolley presumably already had a copy of the IFB. The letter identified the justification as that of the contracting officer. We do not believe it is significant that it was undated since it represents the Navy's justification for its action and our review of the document is for the purpose of ascertaining whether facts existed that justified inclusion of the bonding requirements. Whether the particular document spelling out the justification was extant at the time of the decision is not controlling. See Tosco Corporation, B-187776, May 10, 1977, 77-1 CPD 329.

In our opinion, the Navy has justified the imposition of the bonding requirements because of the need to protect

the large inventory of Government-owned material and the potentially severe financial consequences of contractor default in performance. In view of the above, we find that the contracting officer has properly exercised his discretion under DAR § 10-104.2 (1976 ed.).

Accordingly, the protest is dismissed in part and denied in part.

*for*   
Comptroller General  
of the United General