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

FILE: B-218875.2 **DATE:** July 29, 1985

MATTER OF: Southwest Marine, Inc.

DIGEST:

1. Protest that Miller Act performance and payment bond requirements are inapplicable to a Department of Transportation contract for the conversion of a government-owned vessel is denied where the statute, by specifically providing that the Secretary of Transportation may waive such bonding requirements with respect to contracts for the construction, alteration, or repair of vessels of any kind or nature, clearly indicates that vessels owned by the government are "public works" and therefore embraced by the Miller Act.

2. The fact that seven out of eight bids received included the requisite bid guarantee, which is to be submitted when performance and payment bonds are required, clearly refutes an assertion that a bonding requirement unduly restricted competition.

3. An agency was fully justified in requiring a performance bond to protect the government's interest where the contract involved the extensive utilization by the contractor of a government-furnished vessel in performing conversion work, and where the contractor was to assume an existing contract for the construction of ship cranes to be incorporated into the vessel, the amount of which represented nearly half of the total contract price.

4. An assertion that a requirement for Miller Act bonds constituted an improper predetermination of responsibility is without merit where the agency determined that evidenced

potential underbidding might jeopardize performance of the contract and payment to laborers, materialmen, and suppliers, the very occurrences which the provisions of the Miller Act were intended to mitigate.

Southwest Marine, Inc. protests the requirement for performance and payment bonds under invitation for bids (IFB) No. DTMA-91-85-B-50503, issued by the Department of Transportation, Maritime Administration (MARAD). The procurement is for the conversion of a government-owned vessel into an auxiliary crane ship for use by the Department of the Navy. Southwest essentially contends that the bonding requirement is contrary to regulation and serves no useful purpose in protecting the government's interest. We deny the protest.

At the outset, we question whether Southwest remains an "interested party" to pursue the protest because of the results of the competition. Since Southwest's bid, which included neither the bid guarantee nor the premium to obtain it, was only fifth lowest firm can reasonably expect to receive the award even if we were to conclude that the bonding requirement was improper and should now be waived. In this regard, the four lower bids would be even lower absent the bid guarantee premiums. See Marine Industrial Insulators, B-217443, June 14, 1985, 85-1 CPD ¶ __. However, because Southwest was an "interested party" within the meaning of GAO Bid Protest Regulations when it filed the protest prior to bid opening, see 4 C.F.R. § 21.0(a) (1985), we will consider the protest on the merits.

Background

The solicitation contemplated the award of a firm-fixed-price contract for the vessel conversion effort. Under the terms of the solicitation, the contractor was to assume an existing contract for construction of the ship cranes in the amount of $10,170,000 by which the crane builder would become a subcontractor of the shipyard, and all bids were to include that amount as part of the total conversion price. The solicitation further provided that the contractor was to furnish a performance bond in the amount of the full contract price and a payment bond in the

amount of $2.5 million within 10 days of receipt of the notice of award. Because performance and payment bonds were required, all bidders were also required to submit with their bids a bid guarantee equal to 20 percent of the bid price (but not to exceed $3.0 million). Eight bids were received in response to the IFB. Southwest's bid was fifth lowest at $22,900,000, and the firm was the only bidder not to submit a bid guarantee with its bid.

Southwest contends that the requirement for performance and payment bonds is in violation of the Federal Acquisition Regulation (FAR), 48 C.F.R. § 28.103-1(a) (1984), which provides that, in general, contracting agencies shall not require such bonds for other than construction contracts. In this regard, the firm asserts that the vessel conversion work is not in the nature of a construction contract. To support its assertion, Southwest refers to the FAR, 48 C.F.R. § 36.102, which provides, in part:

> "Construction does not include the manufacture, production, furnishing, contruction, alteration, repair, processing, or assembling of vessels, aircraft, or other kinds of personal property."

Southwest believes that MARAD, in requiring the bonds, has erroneously relied upon the provisions of the Miller Act, as amended, 40 U.S.C. § § 270a-270f (1982), which, according to the firm, only relates to the furnishing of performance and payment bonds on contracts for the construction, alteration, or repair of public buildings or public works of the United States, and, therefore, is inapplicable to a vessel conversion contract.

Southwest contends that the bonding requirement unduly restricts competition, especially by small business concerns such as itself, because of the difficulty in finding an acceptable surety willing to provide the bonds, and because of the high direct costs associated with them.

Southwest urges that the bonding requirement serves no useful purpose in protecting the government's interest. The firm asserts that the only government-furnished property involved in the work is the vessel itself, which,

for the most part, is to be self-insured by the government during the actual conversion effort. Southwest also notes that the existing crane construction contract to be assumed by the contractor has already been separately bonded, and the firm accordingly believes that MARAD acted unreasonably in requiring a performance bond in the amount of the full contract price.

Finally, Southwest also contends that MARAD's stated reason for requiring the bonds--its concern that shipyards have usually underbid such work in the past--constitutes an improper predetermination of responsibility. In this regard, Southwest notes that MARAD waived the bonding requirement for two identical prior vessel conversion contracts, but refused to do so here after the firm had requested such a waiver.

Analysis

We do not agree that the provisions of the Miller Act are inapplicable to this procurement. Specifically, we refer to 40 U.S.C. § 270f, which provides that:

> "The Secretary of Transportation may waive sections 270a to 270d of this title, with respect to contracts for the construction, alteration, or repair, of vessels of any kind or nature . . ."

From this, it is clear that the Miller Act, expressly requiring that performance and payment bonds be furnished for contracts "for the construction, alteration, or repair of any public building or public work of the United States" which exceed $25,000 in amount, 40 U.S.C. § 270a, is also applicable to a government-owned vessel conversion contract, since the vessel is indicated to be a "public work" of the United States.

In the legislative history of 40 U.S.C. § 270f, as added by section 39 of the Merchant Marine Act of 1970, Pub. L. No. 91-469, 84 Stat. 1018, 1036, and as amended by section 12(12) of the Maritime Act of 1981, Pub. L. No. 97-31, 95 Stat. 151, 154 (which substituted "Secretary of Transportation" for "Secretary of Commerce") the Senate Committee on Commerce stated:

> "A vessel constructed for the United States, or repairs to a vessel owned by the United States, constitute a public work within the meaning of this statute."

S. Rep. No. 1080, 91st Cong., 2d Sess. 62, reprinted in 1970 U.S. Code Cong. & Ad. News 4188, 4236.

We also note that the Supreme Court, in a case involving the former section 270 of title 40 (as originally enacted by the Act of August 13, 1894), long ago held that a vessel being built for the United States was a "public work" within the meaning of the statute. Title Guaranty & Trust Co. v. Crane Co., 219 U.S. 24 (1910). We therefore believe that Southwest's position as to the inapplicability of the Miller Act to this procurement is in error.

We do not agree with Southwest's assertion that Part 36 of the FAR effects a waiver by the Secretary of Transportation of the bonding requirements for vessel contracts by excluding vessels from the definition of construction. Part 36, by its own terms, prescribes the "policies and procedures peculiar to contracting for construction and architect-engineer services" for "buildings, structures and other real property." It is not intended to be all-inclusive or to apply to other "public works," such as vessels, that can be categorized as personal property.

Furthermore, as already indicated, the Miller Act, 40 U.S.C. § 270f, supra, statutorily vests the authority to waive bonding requirements for vessel contracts with the Secretary of Transportation, thus affording the Secretary broad discretion to decide whether a bonding requirement in a particular instance is in the government's best interest. See B-199445, Apr. 6, 1982. Although such waiver authority is delegated to the Maritime Administrator, and may be redelegated to the head of the contracting activity, 48 C.F.R. §§ 1201.601, 1202.101, it clearly could not legally be delegated to the FAR Secretariat. Thus, Part 36 of the FAR is inapplicable with respect to any waiver of bonding requirements for vessel contracts.

Moreover, we have consistently held that contracting agencies have the discretion to determine whether the need exists for performance and payment bonds in a particular

procurement. Triple "P" Services, Inc., B-204303, Dec. 1, 1981, 81-2 CPD ¶ 436. Although a bonding requirement in some instances may 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 the contract. Renaissance Exchange, Inc., B-216049, Nov. 14, 1984, 84-2 CPD ¶ 534. Thus, where the decision to require bonds is found to be reasonable and made in good faith, we will not disturb the agency's determination. Cantu Services, Inc., B-208148.2, Dec. 6, 1982, 82-2 CPD ¶ 507.

The fact that seven of the eight bids received in response to the IFB included the necessary bid guarantee, which is to be submitted when performance and payment bonds are required, FAR, 48 C.F.R. § 28.101-1(a), clearly refutes Southwest's assertion that the bonding requirement unduly restricted competition. See Galaxy Custodial Services, Inc., et al., B-215738, et al., June 10, 1985, 64 Comp. Gen. ___, 85-1 CPD ¶ ___. Despite whatever burdens the bonding requirement may have imposed on the firm, bonds are an important aspect of federal procurement, and firms seeking to obtain a government contract should expect to furnish such bonds when the requirement is mandated by statute or otherwise determined to be necessary to protect the government's interest.

In this regard, we also do not concur with Southwest's view that the bonding requirement here serves no useful purpose. Clearly, the vessel itself constitutes government property to be utilized by the contractor in performing the contract, and we have repeatedly held that the use of government property by a contractor serves as a proper justification for a bonding requirement. See Renaissance Exchange, Inc., B-216049, supra. Even if the Miller Act were not applicable to this procurement, we note that the use of government property is one of the examples for performance bond requirements enumerated in the FAR, 48 C.F.R. § 28.103-2(a). We find no merit in Southwest's position that the fact that the government will self-insure the vessel while it is in the possession of the shipyard means that the bonding requirement is, in effect, a redundancy.

MARAD states that it required the performance bond to be in the amount of the full contract price because the contractor, upon assuming the existing crane contract, will become responsible for incorporation of the cranes into the vessel. The separate performance bond for the crane contract expires when the cranes are delivered to the shipyard, and all risks associated with the cranes, such as any damage that might be suffered while awaiting incorporation, will therefore lie with the shipyard contractor. In our view, MARAD acted reasonably in requiring the performance bond to include the amount of the assumed crane construction contract in order to protect the government's interest to the fullest extent.

MARAD also informs us that its experience with recent contracts of this nature indicates that the economic difficulties of many shipyards have led them to underestimate actual costs, and that the resulting underbidding may therefore jeopardize performance of the work and payment to laborers, materialmen, and suppliers, the very occurrences which the provisions of the Miller Act were intended to mitigate. See United States v. Kimrey, 489 F.2d 339 (8th Cir. 1974). In MARAD's view, a waiver of the bonding requirement under 40 U.S.C. § 270f, supra, would not be in the government's best interest. We believe that MARAD's position is reasonable and in full accord with the intent of the Miller Act. Hence, we do not agree with Southwest's assertion that the bonding requirement constitutes an improper predetermination of responsibility. See Renaissance Exchange, Inc., B-216049, supra; Wright's Auto Repair & Parts, Inc., B-210680.2, June 28, 1983, 83-2 CPD ¶ 34.

The protest is denied.

James F. Hinchman
for Harry R. Van Cleve
General Counsel