The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Century Marine Corporation--Reconsideration; Century Marine Corporation--Protest

File: B-233574.2; B-234255; B-234256

Date: May 25, 1989

DIGEST

1. Prior decision, holding that a bidder's failure to certify that only end items that are manufactured or produced by small business concerns will be furnished does not affect the responsiveness of the bid where such small business certification is not required for the type of contract to be awarded, is affirmed where the agency fails to present facts or legal arguments to establish that the prior decision was erroneous.

2. Protests are sustained where bidder was found non-responsive for failing to certify that only end items that are manufactured or produced by small business concerns will be furnished, where such certification is not required for the type of contracts to be awarded.

DECISION

The Maritime Administration (MARAD) requests reconsideration of our decision in Century Marine, Corp., B-233574, Mar. 3, 1989, 68 Comp. Gen. ___, 89-1 CPD ¶ 235. In a separate submission, Century protests the rejection of its bids as nonresponsive and the award of two contracts to Bender Shipbuilding and Repair Company under invitation for bids (IFB) Nos. DTMA-93-88-B-81001 and DTMA-93-88-B-81002, both total small business set-asides, issued by MARAD for the repair of the vessels "Cape Farewell" and "Cape Flattery." We affirm our prior decision and sustain the protests.

RECONSIDERATION

In our prior decision, we sustained Century's protest of the rejection of its bid as nonresponsive and the award of a contract to Houston Ship Repair under IFB No. DTMA-93-88-B-80705, a total small business set-aside, issued by MARAD for

the towing and repair of the vessel "Pioneer Crusader." The agency rejected Century's bid because the firm failed to certify in its bid that all end items to be furnished under the contract would be manufactured or produced by small business concerns.

By way of background, the agency received three bids on August 29, 1988, the bid opening date. The contracting officer determined that Century's low bid was nonresponsive because Century had not entered into a Master Agreement with MARAD before bid opening, and it did not otherwise provide representations and certifications in its bid, including a certification that all end items would be manufactured by small business concerns.

The Master Agreement is used by the agency to standardize vessel repair contracts and contains generally applicable standard form clauses and contractor representations and certifications, including small business certifications. The Master Agreement is entered into by a potential bidder and the agency independent of any procurement and is incorporated by reference into solicitations as issued by the agency. While Century submitted a Master Agreement for the agency's approval on July 15, 1988, it was found to be incomplete, and Century apparently did not submit a properly completed Master Agreement until October 1988, approximately 6 weeks after bid opening. Upon submission of the completed Master Agreement, Century represented that it was a small business concern but that not all end items would be manufactured by small business concerns. Century, in its response to the agency report, stated that it honestly could not certify that all "end items" would be manufactured by small business concerns because ship repair involves "thousands of parts and pieces of equipment," such as steel, that are manufactured by large business concerns. Award was made to Houston Ship Repair, the second low bidder, at a price of $1,335,493, which was approximately $96,000 more than Century's low bid.

In an earlier decision involving the deactivation and repair of the vessel "Cape Ducato," Century Marine Corp., B-232630, Dec. 16, 1988, 88-2 CPD ¶ 598, involving this same protester and agency, and the same solicitation terms, we stated that a bidder's failure to sign the Master Agreement before bid opening does not require rejection of the bid and found that Century's signature on the bid constituted its written agreement to abide by the terms and conditions of the solicitation which specifically included all the terms and conditions of the Master Agreement. We also noted in that decision, as relevant here, that the only material

certification, whether the bidder will supply end items manufactured or produced by small business concerns, was immaterial since that procurement was not a small business set-aside.

Here, however, concerning the repair of the vessel "Pioneer Crusader," the agency argued that this solicitation was a small business set-aside and that Century's failure to certify that it will furnish end items from small business concerns rendered the bid nonresponsive.

In our March 3 decision sustaining the protest, we found that the Master Agreement, referenced in the IFB, incorporated Federal Acquisition Regulation (FAR) clause 52.219-1 (FAC 84-28), the small business concern representation. This clause in part requires that the bidder certify that it will furnish only end items that are manufactured or produced by small business concerns inside the United States, its territories and possessions. We further found that the Master Agreement also incorporated another applicable small business clause (Notice of Total Small Business Set-Aside--FAR clause 52.219-6), which specifically states that the end item requirement does not apply in connection with construction or service contracts. Since our review of the solicitation clearly showed that the procurement was for towing and ship repair services and did not contemplate a supply contract, we concluded that Century's failure to certify did not affect the responsiveness of the firm's bid, and we therefore sustained the protest.

In its request for reconsideration, MARAD basically argues that Century's protest was untimely filed and that our Office incorrectly concluded that the contract at issue was for services and not supplies.

Initially, MARAD argues that, in a supplemental filing, MARAD established that Century's protest was untimely and that the protest should have been dismissed pursuant to our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(2) (1988), which require that protests be filed not later than 10 days after the basis of protest is known. In its supplemental filing, MARAD argued that Century knew that it was deemed nonresponsive and that award had been made to Houston as early as October 17, 1988, approximately 1 month prior to filing its protest on November 10.

The agency's supplemental filing was received more than a month after the agency's report on the merits was filed with our Office. While MARAD characterizes its timeliness argument as one based on new information, we note that the

information consists of correspondence which was contained in the agency's files, and which indicated that the agency should have been aware of this information when it filed its initial report. In view of the above, we think our consideration of Century's protest was appropriate. 4 C.F.R. § 21.3(n) (1988)

Next, MARAD contends that ship repair contracts are in the nature of supply contracts. In support of its position, MARAD argues that, by analogy, the provisions of 10 U.S.C. § 7299 (1982) which, in reference to naval vessels, declares that the supply contract provisions of the Walsh-Healey Act, 41 U.S.C. §§ 35-45 (1982), apply to the alteration, furnishing and equipping of vessels, should apply here. MARAD further argues that in our decision 42 Comp. Gen. 467 (1963), we generally recognized the nature of ship repair contracts as supply-oriented.

We are not persuaded by MARAD's arguments. The provisions of 10 U.S.C. § 7299 do not refer to ship repair, and MARAD does not explain why a ship repair contract should be considered to fall under 10 U.S.C. § 7299. Further, the purpose of that legislation was to make clear the view of Congress that contracts for the construction or alteration of vessels are subject to the Walsh-Healey Act, 41 U.S.C. §§ 35-45. See 42 Comp. Gen. 467, at 477, supra. The legislation does not relate to ship repair contracts.

The analogy to 10 U.S.C. § 7299 must also fail because ship repair is not legally recognized as equivalent to ship alteration or ship construction work. For example, we point out that repair work, including the repair of such things as aircraft and vehicles, generally, is considered service work subject to the Service Contract Act. See 29 C.F.R. § 4.130(a)(33) (1988). In contrast, FAR § 2.101 (FAC 84-26) specifically defines alteration of vessels as "supplies." Further, it is most significant, in our view, that MARAD makes no argument that the classification of such a repair contract as one for supplies is logical. We do not understand how it can be argued that as between the two categories--supplies or services--a contract for the repair of a vessel is classified as one for the supply of the vessel rather than for the repair services to be performed on that vessel.

Also, in 42 Comp. Gen. 467, supra, we addressed the question of whether a contract for the alteration of a vessel should be governed by that portion of the Buy American Act pertaining to public works or to that section pertaining to

supplies.1/ The decision did not consider whether a ship repair contract is to be considered one for services or supplies.

Here, the procurement does not involve construction or alteration of a vessel and does not involve a naval vessel. The requirement here, in fact, was for the repair of a non-naval vessel. Specifically, the procurement was for vessel towing, blasting, coating, cargo gear repairs, hull repairs, machinery repairs and electrical repairs. Although ship repair services involve the furnishing of incidental parts to be incorporated into the vessel, the predominant line items here were ship repair services which clearly accounted for the greatest percentage of the total contract value. As such, Century could qualify as a small business for such a procurement without certifying that the incidental items would be furnished by small business. See 13 C.F.R. § 121.5(c) (1988).

Moreover, the Master Agreement itself contains clauses relating to both supply and services, indicating that MARAD itself understood that such procurements for vessel repair could be for services. Based on the foregoing, since 10 U.S.C. § 7299 is not applicable here, and since the procurement is for towing and ship repair services, we again find that the solicitation did not contemplate a supply contract. Since the contract contemplated services, MARAD had no right to require the certification. Accordingly, we affirm our prior decision.

PROTESTS

In a separate submission, Century protests the rejection of its bids as nonresponsive and award of two contracts to Bender for repair of the vessels, "Cape Farewell" and "Cape Flattery." MARAD again rejected Century's bids because the firm failed to certify in its bid that all end items to be

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1/ In a recent decision, G. Marine Diesel Corp., B-234196, May 1, 1989, 89-1 CPD ¶ ___, we concluded that 10 U.S.C. § 7299 and 42 Comp. Gen. 467 did not require ship repair services to be categorized as pertaining to supplies.

furnished under the contracts would be manufactured or produced by small business concerns.2/

The procurement for the "Cape Farewell" includes completion of surveys and inspections, vessel preservation, readiness enhancement, repairs and incidental supplies to be incorporated in the vessel. Likewise, the procurement for the "Cape Flattery" includes completion of inspections, vessel topside waterblasting and coating, readiness enhancements, repairs and incidental supplies to be incorporated in the vessel. As such, the procurements are clearly for ship repair services.

Accordingly, since our review of the solicitations clearly shows that the procurements do not contemplate supply contracts, and since the certification is not required for service contracts, Century's failure to certify did not affect the responsiveness of the firm's bid. See BCI Contractors, Inc., B-232453, Nov. 7, 1988, 88-2 CPD ¶ 451. We therefore sustain the protests.

Since significant performance under the awarded contracts has again occurred, as in the prior case, the award cannot be disturbed. However, in view of our conclusion that Century's bids were responsive and improperly rejected, we think that Century is entitled to bid preparation costs and to the costs of filing and pursing the protests, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d). Century should submit its claim for such costs directly to the agency.

2/ As a preliminary matter, MARAD timely objects that these protests are also untimely for the same reasons it considers untimely the protest involving the repair of the "Pioneer Crusader." The protester contends that while it was aware that its bids were rejected, it was never advised, formally or informally, of the specific reason for the rejection until after its protests were filed in mid-January, 1989. The record supports this view. We find that it is not clear whether the protester was aware of the specific basis of protest until it filed its protests. Under the circumstances, we will consider these protests. See Menasco, Inc., B-223970, Dec. 22, 1986 86-2, CPD ¶ 696.

CONCLUSION

The prior decision is affirmed and the protests are sustained.

Milton J. Socolar

Acting Comptroller General
of the United States