



Comptroller General  
of the United States

Washington, D.C. 20548

## Decision

**Matter of:** Eastern Technical Enterprises, Inc.,

**File:** B-235880

**Date:** September 28, 1989

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### DIGEST

1. Protest that bonding requirements under a solicitation for a ship conversion contract are not in the government's best interest and constitutes an impediment to small businesses is denied because the Miller Act requires the contracting agency to obtain performance and payment bonds for the contract in question.
2. The contracting officer has the discretion to determine whether and under what terms a provision for progress payments should be included in a solicitation and properly may require bonding and the retainage of a percentage of the contract price from progress payments in the same procurement.
3. Allegation that solicitation unfairly permits the contracting agency to withhold final payment under the contract until all disputes and claims under the contract have been settled is rendered academic where the procuring agency deletes the requirement by amending the solicitation.

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### DECISION

Eastern Technical Enterprises, Inc., protests certain requirements under invitation for bids (IFB) No. DTMA91-89-B-90026, a total small business set-aside, issued by the Department of Transportation, Maritime Administration (MARAD), for the deactivation and conversion of the SS Chesapeake into an offshore petroleum discharge system. In particular, Eastern Technical contends that the solicitation bonding requirements are not in the best interest of the government and that bonding is difficult for small businesses to obtain; that the agency should not require

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both bonding and progress payment retainage in the same contract; and that withholding final payment until all disputes and claims under the contract have been settled is unfair and improper.

We deny the protest in part and dismiss it in part.

The IFB, issued on May 4, 1989, required that the bidder furnish performance and payment bonds in specified amounts and a bid guarantee, and advised bidders to include the cost of all required bonds in the bid price. The IFB authorized progress payments at a rate not to exceed 95 percent of the contract price, with the retainage to be paid within 30 days of the end of the guarantee period when all redelivery and guarantee obligations had been satisfied, and all disputes and claims had been settled under the contract. By amendments to the IFB, MARAD reduced the performance bond requirement from 100 percent to 75 percent of the contract price, and deleted the requirement to settle all disputes and claims under the contract before payment of the retainage. Bid opening was scheduled on June 30, 1989.

We find that MARAD properly required bonding for this procurement. The fact that a particular contractor may be unable to obtain bonding does not make the requirement improper if it is otherwise appropriate. BPOA Indus. Painters, B-231671, Sept. 23, 1988, 88-2 CPD ¶ 281. In order to protect the United States and all persons supplying labor and materials under contracts for the construction, alteration or repair of any public building or public work, the Miller Act (40 U.S.C. §§ 270a-270f (1982 and Supp. IV 1986) requires that the contract awardee furnish performance and payment bonds for all contracts which exceed \$25,000 in amount. The bonding requirement applies to this procurement since the conversion of a ship is considered construction within the meaning of the Miller Act and the cost of the project is well in excess of \$25,000. See Southwest Marine, Inc., 64 Comp. Gen. 714 (1985), 85-2 CPD ¶ 104. The use of a bid guarantee is mandatory where, as here, performance and payment bonds are required. Federal Acquisition Regulation (FAR) § 28.101-1 (FAC 84-12); BPOA Indus. Painters, B-231671, supra. We note that MARAD reports that none of the other small business bidders complained of the bonding requirement and that Eastern Technical submitted the required bonding with its bid on the June 30 bid opening date.

Regarding the IFB provision for retaining 5 percent of the contract price prior to final payment, MARAD reports that retaining money is necessary to allow for risk in case of a

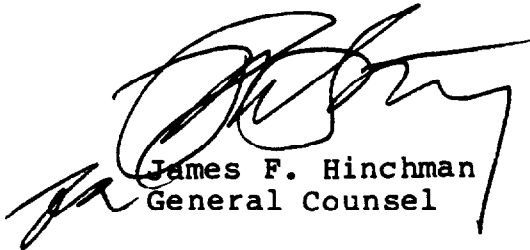
default or incomplete performance by the contractor. Further, MARAD reports that sureties anticipate using retained funds to defray costs in the event of contractor default. Although, Eastern Technical argues that the FAR does not contemplate an agency using bonds and retaining a percentage of the contract price from progress payments in the same contract, there is no such proscription under the FAR. Bonding requirements and progress payments accomplish two different procurement objectives. Bonds serve to protect the government's interest and the interest of persons supplying labor and materials to the contractor in the event of default. Progress payments are a means of financing the contractor prior to completion of the contract. A contractor is not entitled to progress payments and we have held that the contracting officer generally has the discretion to determine whether and under what terms a provision for progress payments should be included in the solicitation. PTI Serv., Inc., B-225712, May 1, 1987, 87-1 CPD ¶ 459.

Here, the IFB progress payment provisions allow MARAD to retain 5 percent of the contract price which is significantly more generous to the bidders than the customary progress payment rate which includes retainage of 15 percent of the contract price in the case of small businesses. See FAR § 32.501 (FAC 84-29). Moreover, FAR § 32.501-2(b), which governs an unusual progress payment rate such as this, states that the excess of the unusual progress payment rate should be the lowest amount possible under the circumstances. MARAD notes the precarious financial state of the maritime repair industry and of numerous individual repair yards, and states that these contracts present a significant of default. Accordingly, the contracting officer reasonably required 5 percent of the contract price from progress payments retainage.

Eastern Technical's objection as to the IFB requirement making final payment available only after settling all disputes and claims under the contract, was rendered academic by amendment No. 2 which deleted the requirement from the IFB. That amendment now provides for final payment within 30 days of the end of the guarantee period when all redelivery and guarantee objections have been satisfied and the final contract price has been determined. Eastern Technical now argues that this language obfuscates whether MARAD will be able to withhold funds under the contract for an unreasonable amount of time after completion of the contract. However, Eastern Technical's complaint actually concerns whether MARAD will fairly handle contract disputes

under this provision of the contract. This involves a matter of contract administration which does not fall within the purview of our protest review function. Eastern Technical Enters., Inc, B-235421, Aug. 3, 1989, 89-2 CPD ¶ \_\_\_\_; ESCO Eng'g, B-234749, June 22, 1989, 89-1 CPD ¶ 591.

The protest is denied in part and dismissed in part.



James F. Hinchman  
General Counsel