

Mr. Spiegel



Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Max Contracting, Inc.--Reconsideration

File: E-241367.3

Date: March 13, 1991

Charles M. Allen, Esq., Wright, Robinson, McCammon, Osthimer & Tatum, for the protester.
J. Carter Brown, National Gallery of Art, for the agency.
Robert Spiegel, Esq., and James Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Untimely protest of a solicitation's failure to include a requirement for performance and payment bonds will not be considered under the significant issue exception to the timeliness rules of our Bid Protest Regulations, where resolution of that matter would not be of widespread interest to the general procurement community.

DECISION

Max Contracting, Inc. requests reconsideration of our dismissal as untimely of its protest of the award to William H. Walston Co., under request for proposals (RFP) No. NGA-90-R-023, issued by the National Gallery of Art, for finishing and painting services. Max protested that the award was improper because the awardee failed to provide performance and payment bonds in violation of the Miller Act, 40 U.S.C. § 270a (1988).^{1/} Max contends that it should have received the award as it was the only offeror to furnish bonds in accordance with the law.

We affirm the prior dismissal.

The RFP contemplated the award of a requirements contract for interior finishing and painting services in fiscal year 1991, with two yearly options. The RFP contained no requirement for payment or performance bonds. Proposals were received on August 28, 1990, and award was made on September 17, 1990.

^{1/} The Miller Act states that "[b]efore any contract, exceeding \$25,000 in amount, for the construction, alteration, or repair of any building or public work of the United States is awarded to any person, such person shall furnish to the United States [payment and performance] bonds . . ."

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Max protests that the award to Walston will result in a violation of the Miller Act because the awardee did not provide performance and payment bonds for what appears to be a construction contract. Max admits that the solicitation did not contain a bond requirement; that its protest was filed after the closing date for receipt of proposals; and that "[n]either Max, nor any other offeror, may complain now that the provision was omitted from the RFP."^{2/} In effect, Max's protest is that the solicitation was defective. See Dyncorp, B-240980.2, Oct. 17, 1990, 70 Comp. Gen. ____, 90-2 CPD ¶ 310. Since this apparent solicitation impropriety was required to be protested before the closing date for receipt of proposals, the original protest was properly dismissed as untimely under our Bid Protest Regulations. 4 C.F.R. § 21.2(a)(1) (1990).

Max alternatively requests that we consider this matter, even if it is considered to be untimely, "because it raises an issue of significance to the procurement system." See 4 C.F.R. § 21.2(b). Our timeliness rules reflect the dual requirements of giving parties a fair opportunity to present their cases, and resolving protests expeditiously without unduly disrupting or delaying the procurement process. Dyncorp, B-240980.2, *supra*; Lucas Place, Ltd.--Recon., B-238008.3, Sept. 4, 1990, 90-2 CPD ¶ 180. Thus, we may invoke the "significant issue" exception to our timeliness rules when, in our judgment, the circumstances of a particular case warrant consideration of the protest in the interest of the procurement system. In order to prevent the timeliness rules from becoming meaningless, we strictly construe and seldom invoke the significant issue exception. Id. Our Office will only invoke the significant issue exception to protests that raise issues, which previously have not been considered on the merits and which raise issues of widespread concern to the general procurement community. Id.

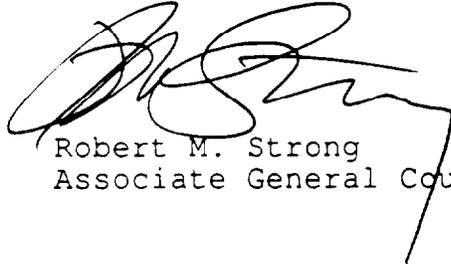
We have considered the applicability of the Miller Act requirement for performance and payment bonds on a number of occasions. See, e.g., BPOA Industrial Painters, B-231671, Sept. 23, 1988, 88-2 CPD ¶ 281. While the determination as to whether this particular work is for construction (thereby requiring performance and payment bonds) may be of interest to the National Gallery of Art and the protester, it appears that the resolution of this issue relates only to the instant

^{2/} Max contacted the agency about the absence of a bonding requirement from the RFP before the firm submitted its proposal. The agency informally advised Max that there was no such requirement. Max did not then protest the matter but submitted a proposal which included bonds.

procurement and is not of widespread interest to the general procurement community.

In view of the foregoing, the dismissal is affirmed. Nevertheless, the record here indicates this work is construction under the Miller Act.^{3/} While we will not waive our timeliness rules, we are notifying the National Gallery of Art, by separate letter, that the solicitation seems defective in order that the agency may address this matter as it considers appropriate. See Dyncorp, B-240980.2, supra.

The dismissal is affirmed.



Robert M. Strong
Associate General Counsel

^{3/} Construction is defined to include painting, alteration and improvements to all types of buildings, structures or other real property. See Federal Acquisition Regulation § 36.102. The statement of work here requires finishing and painting of interior partitions of various areas in the museum building, including exhibition spaces and permanent collection spaces. Work items include the repair (including plastering) of walls, ceilings and floors; and the painting of partitions and ceilings. The agency asserts that this is not construction because the contractor is not responsible for acquiring its own materials and the contractor employees supplied under this contract are under the direct supervision of agency personnel. However, these criteria are not relevant in determining whether a contract is for construction. Rather, the nature of the work accomplished and trades employed are the factors that determine this matter. Here, the statement of work summarizes the work as involving finishing and painting trades normally utilized in the "construction and alteration of museum exhibitions." Thus, we think this work is construction and, since the work exceeds \$25,000, the Miller Act applies to the contract.