**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: M.E.E., Inc.

File: B-265605.3; B-265605.4

Date: February 22, 1996

Donald A. Tobin, Esq., Thomas J. Touhey, Esq., and Lori Ann Lange, Esq., Bastianelli, Brown, Touhey, & Kelley, for the protester.
Lt. Col. Richard W. Tobin II, and Kathryn M. Burke, Esq., Department of the Air Force, for the agency.
Henry J. Gorczycki, Esq., and Guy R. Pietrovito, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where a solicitation's required Davis-Bacon Act wage determination is revised after submission of proposals but prior to award, the contracting agency properly proposes to amend the solicitation to incorporate the revised determination and reopen the competition to permit submission of revised proposals.

2. Where an agency proposes to amend a solicitation and reopen the competition on bases that are not the subject of a protest, the proposed action is not corrective action in response to a protest and the protester is not entitled to reimbursement of its protest costs.

DECISION

M.E.E., Inc. protests the reopening of discussions under request for proposals (RFP) No. F02604-94-R0010, issued by the Department of the Air Force for maintenance, repair, and minor construction services under the simplified acquisition of base engineering requirements at Luke Air Force Base, Gila Bend Air Force Auxiliary Field, and Fort Tuthill Recreation Area, Flagstaff, Arizona. M.E.E. also claims entitlement to protest costs under this and two earlier protests filed against a contract awarded to PI Construction Corporation.

We deny the protest and the claim.

The RFP, issued on October 25, 1994 as a total set-aside for small disadvantaged businesses (SDB), contemplated award of an indefinite delivery/indefinite quantity, fixed-price task order contract. The RFP provided for award on a best value basis and stated that technical merit and price were of equal importance.

Offerors were required to propose prices in terms of a coefficient of the "Means price," which is determined from standardized prices for construction work published in the Means cost book. Under this pricing method, the sum of labor and materials is adjusted to reflect the Phoenix City Cost Index and minimum wage rates specified under the Davis-Bacon Act, 40 U.S.C. § 276a (1994), to produce the Means price. The Means price for work performed under the contract will be multiplied by the contractor's proposed price coefficient to ascertain the price to be paid the contractor for work performed. Thus, an offeror proposing a coefficient of 1.0 offers to perform the contract at the Means price, while a proposed coefficient greater than 1.0 or less than 1.0 is an offer to perform at a price greater than or less than the Means price, respectively.

After the conduct of discussions and evaluation of best and final offers (BAFO), the Air Force awarded a contract to PI as representing the best value to the government. PI's proposal was higher-rated technically and was priced higher than M.E.E.'s.

On August 4, 1995, M.E.E. protested the award to PI to our Office on the following bases (hereafter, the "first protest"):

> "A. The Air Force failed to give equal weight to cost and technical criteria[;]
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> "B. Air Force improperly penalized M.E.E. for providing a price below the coefficient[;]
>
> "C. The Air Force failed to hold meaningful discussions with M.E.E.[;]
>
> "D. The Air Force improperly gave credit to capabilities not required by the solicitation[.]"

M.E.E. also protested PI's SDB status to the Small Business Administration (SBA). On September 13, 1995, at about the time the Air Force submitted its report on M.E.E.'s first protest, the SBA determined that PI did not qualify as an SDB concern for this procurement. On September 15, M.E.E. submitted two additional protest bases (hereafter, the "second protest") to our Office, challenging the award to PI because the SBA had determined that PI was not an SDB concern, and objecting to the Air Force's evaluation of M.E.E.'s proposed price coefficient.

On September 29, the Air Force terminated PI's contract based upon the SBA's determination that the contractor was not an SDB concern. On October 3, the Air Force notified our Office of the termination, stating that it was amending the RFP and would reopen discussions and request revised BAFOs.

On October 5, M.E.E. protested the Air Force's proposed amendment of the RFP and reopening of negotiations (hereafter, the "third protest"). M.E.E. contends that an award can and should be made based on the BAFOs previously submitted, and further argues that the Air Force improperly disclosed M.E.E.'s price coefficient to competitors when the agency advised competitors of M.E.E.'s initial protest bases, so that reopening the competition would result in an improper auction.

The agency responds that the RFP needs to be amended because of possible confusion concerning the weight to be given technical merit and price, and to reflect the agency's changed requirements. Specifically regarding the evaluation factors, the Air Force states that while it agrees with the protester that price and technical merit were intended to be accorded equal weight, there are some inconsistent solicitation references to the evaluation criteria that may cause confusion to offerors, and the agency needs to amend RFP sections L and M to resolve any possible ambiguity arising from such inconsistencies. Regarding the agency's changed needs, the solicitation will be amended to eliminate requirements for computers and computer software that are no longer needed, change the percentage of work to be performed at two of the three locations, and incorporate revised Davis-Bacon Act wage determinations that, on the whole, increase the applicable minimum wage rates.

Given the Air Force's termination of PI's contract, the primary issue for our resolution is the propriety of the agency's decision to amend the solicitation and reopen the competition. As M.E.E. states in the third protest, it believes the competition need not be reopened because the proposed amendment would have no material effect on the BAFOs already submitted, and should not be reopened in any event, to avoid an auction situation. We do not agree with either position.

Where a contracting agency receives a modification to a Davis-Bacon Act wage determination before award that increases any wage rates, the contracting officer is required to amend the solicitation to incorporate the new determination, furnish the wage rate information to all offerors that submitted proposals, and allow offerors a reasonable opportunity to submit revised proposals. See Federal Acquisition Regulation (FAR) §§ 22.404-6(c), 22.404-5(c)(3); OMNE of New Jersey, Inc., 71 Comp. Gen. 274 (1992), 92-1 CPD ¶ 236. Recompetition in order to permit incorporation of an applicable wage determination into the solicitation is proper even where prices have been exposed. See Prestige Constr. Co., B-224327, Nov. 19, 1986, 86-2 CPD ¶ 590; Bick-Com Corp., B-189894, Nov. 23, 1977, 77-2 CPD ¶ 404.

M.E.E. nevertheless argues that the changes in the wage rates in this case do not materially affect offerors' proposed prices because the Means price used to calculate contract payments accounts for changes in Davis-Bacon wage determinations, and thus any amendment incorporating such changes is immaterial and does not justify reopening the competition. We disagree.

The principal purpose of the Davis-Bacon Act is to protect a contractor's employees from substandard earnings by fixing a floor under wages on government projects. ABC Paving Co., 66 Comp. Gen. 47 (1986), 86-2 CPD ¶ 436. The Air Force RFP incorporated by reference the standard Davis-Bacon Act clause (Nov 1992) set forth at FAR § 52.222-6, which obligates the contractor to pay only the wages contained in the wage rate determination incorporated into the RFP. The revised wage rate determinations have not been incorporated into the RFP and, therefore, the previously submitted BAFOs do not obligate the offerors to pay these increased wage rates. Where a contract resulting from a solicitation would not bind the contractor to pay its employees applicable increases in the Davis-Bacon Act wage rates, an amendment incorporating such wage rate changes into the solicitation is material regardless of its effect on price. Id.; Promethean Constr. Co., Inc., B-255222, Feb. 7, 1994, 94-1 CPD ¶ 78.

M.E.E. also complains that the agency disclosed information about M.E.E.'s price coefficient to competitors and that reopening the competition therefore would constitute an improper auction. We disagree.

Prohibited auction techniques essentially consist of government personnel furnishing information about one offeror's price to another offeror during negotiations, thereby promoting direct price bidding between offerors. FAR § 15.610(e)(2); General Eng'g Serv., Inc., B-242618.2, Mar. 9, 1992, 92-1 CPD ¶ 266. M.E.E.'s allegation is based on the agency's notification to other offerors of M.E.E.'s first protest, where the agency quoted verbatim M.E.E.'s statement that the "Air Force improperly penalized M.E.E. for providing a price below the coefficient."

It is not clear to us that the release of the statement in issue promotes the direct price competition envisioned by the FAR auction prohibition. In any case, where, as here, the reopening of discussions is required, even though an offeror's price itself has been disclosed, the reopening does not constitute an improper auction. The possibility that a contract may not be awarded on the basis of fair and equal competition has a more harmful effect on the integrity of the competitive procurement system than the fear of an auction; the statutory requirement for competition takes priority over the regulatory prohibitions on auction techniques. Ameriko/Omserv--Recon., B-252879.4, May 25, 1994, 94-1 CPD ¶ 341.

In sum, we find that the agency could not properly make a new award selection after the termination of PI's contract without amending the RFP to incorporate the higher, revised Davis-Bacon Act wage determinations and obtaining offerors' revised proposals. Since this alone provides a sufficient basis to reopen the competition, we need not address M.E.E.'s objections to the agency's other reasons for reopening.

We also need not address M.E.E.'s remaining protest issues, which concern the agency's award to PI, the conduct of discussions, and the evaluation of M.E.E.'s proposal. M.E.E.'s challenge to the award to PI was rendered academic by the Air Force's termination of PI's contract promptly after the SBA's determination that PI was not an SDB concern. M.E.E.'s objections to the conduct of discussions and evaluation of its proposal are rendered academic by the agency's determination to reopen negotiations, obtain revised proposals, and perform a new evaluation. Since it is not our practice to consider academic questions, these protest issues are dismissed. East West Research, Inc.--Recon., B-233623.2, Apr. 14, 1989, 89-1 CPD ¶ 379.

Finally, M.E.E. requests that we find it entitled to reimbursement of protest costs for its three protests. M.E.E. contends that the agency's proposed amendment to eliminate apparent inconsistencies in the RFP's description of and references to the evaluation factors is corrective action in response to M.E.E.'s protest that the agency did not apply the stated evaluation plan during evaluations.

Our Bid Protest Regulations provide that a protester may be entitled to reimbursement of protest costs where the procuring agency takes corrective action in response to a clearly meritorious protest. See 4 C.F.R. § 21.8(e) (1995); Tri-Ex Tower Corp., B-245877, Jan. 22, 1992, 92-1 CPD ¶ 100. Where an agency's actions do not constitute corrective action in response to a protest issue, the protester is not entitled to reimbursement. Tri-Ex Tower Corp., supra.

The recompetition action proposed by the Air Force is not corrective action in response to M.E.E.'s protests. M.E.E.'s allegations of a defective technical evaluation (the first protest) did not prompt the Air Force to propose to amend the RFP as discussed above. Rather, as we have found, the amendment was required as a legal matter--and, in fact, the Air Force has defended the original evaluation as consistent with the solicitation's evaluation plan. Also, the termination of PI's contract, which rendered academic M.E.E.'s challenge of the selection (the second protest), was to comply with the SBA's determination of PI's eligibility for the award. In such circumstances, M.E.E. is not entitled to reimbursement of its protest costs. Id.; Loral Fairchild Corp.--Entitlement to Costs, B-251209.2, May 12, 1993, 93-1 CPD ¶ 378; Mantech Field Eng'g Corp.--Recon., B-246152.5, Dec. 17, 1992, 92-2 CPD ¶ 422.

The protest and the request for costs are denied.

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