**Comptroller General
of the United States**

Washington, D.C. 20548

Decision

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

File: B-265605.5

Date: May 29, 1996

Donald A. Tobin, Esq., and Thomas J. Touhey, Esq., Bastianelli, Brown, Touhey, & Kelley, for the protester.
Henry J. Gorczycki, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Agency properly amended solicitation and obtained revised proposals, as required by the Federal Acquisition Regulation §§ 22.404-5(c)(3) and 22.404-6(c)(2), because it received a revised Davis-Bacon Act wage determination prior to award; this was not corrective action in response to a prior protest entitling the protester to the recovery of its protest costs because the revised wage determination was unrelated to the protest.

DECISION

M.E.E., Inc. requests reconsideration of our decision on its protests and claim for costs, M.E.E., Inc., B-265605.3; B-265605.4, Feb. 22, 1996, 96-1 CPD ¶ 109, regarding the Department of the Air Force's decision to amend and request revised best and final offers (BAFO) under request for proposals (RFP) No. F02604-94-R-0010, issued for a Simplified Acquisition of Base Engineering Requirements (SABER) procurement for maintenance, repair, and minor construction work at various facilities in Arizona. We denied the protest because the agency was required by regulation to amend the solicitation and permit submission of revised BAFOs because it had received a revised Davis-Bacon Act wage determination. We denied the claim for costs because the required actions were not attributable to M.E.E.'s prior protests. M.E.E. alleges that we incorrectly determined that the amendment of the RFP and revised BAFOs were required, and claims that M.E.E. is entitled to recover its costs of pursuing the protest because the agency's corrective action was actually in response to M.E.E.'s protest.

We deny the request for reconsideration.

Under this SABER procurement, offerors were requested 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. Applicable "Means prices,"

i.e., fixed unit prices comprised of the typical cost of performing maintenance, repair, and construction work in the locations where the contract is performed, are incorporated into the RFP, and subsequently incorporated into the contract once each year when the Means prices are updated. These Means prices account for Davis-Bacon Act wage determinations and modifications to such determinations. The prices for work performed under the contract will be determined by multiplying the applicable Means prices by the contractor's proposed price coefficient.

As explained in our prior decision, award had been previously made to PI Construction Corporation under this RFP set aside for small disadvantaged businesses (SDB). Subsequent to M.E.E.'s protest to our Office, the Small Business Administration (SBA) determined that PI did not qualify as an SDB concern. The agency then decided to obtain revised proposals from the remaining offerors because, among other things, the applicable Davis-Bacon Act wage determination had been modified to increase the wage rates. We denied M.E.E.'s protest that it should have received the award under the RFP, and that the agency had no reasonable basis to amend the solicitation and solicit revised proposals.

In our prior decision, we determined that under Federal Acquisition Regulation (FAR) §§ 22.404-5(c)(3) and 22.404-6(c)(2), the agency was required to amend the RFP to incorporate increases in the Davis-Bacon Act wages and provide offerors an opportunity to submit revised BAFOs. The regulation provides that, in negotiated procurements, if the agency receives a wage modification before contract award, as was the case in the protested procurement, the contracting officer shall follow the procedures in FAR § 22.404-5(c)(3) and (4), which state:

> "(3) If the new determination changes any wage rates, the contracting officer shall amend the solicitation to incorporate the new determination, and furnish the wage rate information to all prospective offerors that were sent a solicitation if the closing date for receipt of proposals has not yet occurred, or to all offerors that submitted proposals if the closing date has passed. All offerors to whom wage rate information has been furnished shall be given reasonable opportunity to amend their proposals.
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> "(4) If the new determination does not change any wage rates, the contracting officer shall amend the solicitation to include the number and date of the new determination and award the contract."

FAR § 22.404-5(c)(3) applies here because the revised wage determination, issued by the Department of Labor prior to award, increased wage rates. We agreed that the agency was required under the circumstances to amend the RFP to include the wage modifications and request revised BAFOs.

M.E.E.'s request for reconsideration repeats its previous arguments that revised proposals did not need to be obtained because the amendment did not involve material matters. M.E.E. argues that under SABER contracts Davis-Bacon wages are accounted for in the Means prices incorporated into the contract and when they are updated they account for revised wage determinations. M.E.E. also notes that the agency incorporates revised wage determinations into the contract as they are issued during contract administration. M.E.E. asserts that the agency was therefore not required to amend the RFP when it received the revised wage determination.

M.E.E.'s arguments provide no basis to reconsider our decision. First, the FAR does not provide for any exception to the rule requiring revised proposals under these circumstances (where Davis-Bacon Act wage determinations change wage rates and are received prior to award) for SABER contracts, which provide for the periodic updating of prices to reflect such things as wage rate changes. Moreover, a contractor's obligation to pay its employees prevailing Davis-Bacon Act wage rates depends on whether the wage determination establishing the prevailing wages has been incorporated into the solicitation/contract or whether there exists some other instrument, such as a collective bargaining agreement, binding the contractor to pay wages to its employees not lower than those in the prevailing Davis-Bacon Act wage determination; this obligation generally is not affected by changes in the contract price. See ABC Paving Co., 66 Comp. Gen. 47 (1986), 86-2 CPD ¶ 436; Robinson & Co., B-265656, Dec. 1, 1995, 95-2 CPD ¶ 262; LaCorte ECM, Inc., B-231448.2, Aug. 31, 1988, 88-2 CPD ¶ 195. Thus, while the Means prices incorporated into the RFP and contract are revised annually to reflect changes in cost elements, including Davis-Bacon Act wage modifications, they neither incorporate revised Davis-Bacon Act wage determinations into the contract nor otherwise bind the contractor to pay the revised wages to its employees. Moreover, where an applicable wage determination has been revised prior to contract award, unless a revised wage determination is incorporated into the RFP, the contractor would not be bound by the contract, as awarded, to pay its employees the revised wages. While an agency could incorporate wage determination modifications into the contract after award, such additional obligations on the contractor should be imposed, where possible, as part of the competition, inasmuch as they define the contractors obligations as of the time of award and may affect the offerors' initial contract prices (in this case, their coefficients). This is why the FAR requires agencies to amend the solicitation and obtain revised proposals when apprised of Davis-Bacon Act wage changes prior to award.

M.E.E.'s remaining allegations also do not provide a basis for modifying our decision. For example, M.E.E. alleges that the Air Force did not previously amend the RFP to incorporate wage modifications at the time they became effective, and thus they should not now be cause for amendment of the RFP. However, an agency's prior incorrect practice is not a basis for protesting the application of

correct procurement practice. Fry Communications, Inc., 62 Comp. Gen. 164 (1983), 83-1 CPD ¶ 109; Blanton Contractors, Inc., B-260562, June 27, 1995, 95-1 CPD ¶ 292.

M.E.E. also reasserts its earlier protest allegation that recompetition here would result in an improper auction.[1] However, as stated in our decision, 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. Ameriko/Omserv--Recon., B-252879.4, May 25, 1994, 94-1 CPD ¶ 341. Thus, where, as here, an agency must provide an opportunity for submission of revised proposals, even the disclosure of an offeror's price is not a basis for precluding the recompetition. See id.

M.E.E. also requests reconsideration of our decision to deny its claim for protest costs because it alleges that the record established that the protester would have prevailed on its primary protest allegation that the agency did not apply the stated evaluation plan. We disagree. We did not decide the merits of this protest issue because the revised Davis-Bacon Act wage determination required amendment of the RFP and submission of revised proposals. Because applicable regulations, not M.E.E.'s protest, required the agency's action of obtaining revised proposals, M.E.E.

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[1]M.E.E. continues to allege that the agency released its price to competitors. However, the record indicates that M.E.E.'s price was not released to its competitors. The specific information which M.E.E. alleges was improperly released was M.E.E.'s protest allegation that the "Air Force improperly penalized M.E.E. for providing a price below the coefficient." The agency notified interested parties to the protest of this and other protest bases. Our Bid Protest Regulations applicable at the time of this protest provide that the agency shall immediately furnish copies of the protest submissions to interested parties to the protest. 4 C.F.R. § 21.3(a) (1995). Unless a protester has identified information as protected, the protest material submitted generally will not be withheld from any interested party. 4 C.F.R. § 21.3(b). M.E.E.'s protest letter containing this statement did not identify this or any other information as protected.

is not entitled to reimbursement of its protest costs.[2] See Tri-Ex Tower Corp., B-245877, Jan. 22, 1992, 92-1 CPD ¶ 100, recon. denied, B-245877.2, Mar. 23, 1993, 93-1 CPD ¶ 258.

The request for reconsideration is denied.

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[2]To the extent M.E.E. alleges that the agency terminated the contract previously awarded to PI Construction Corporation as a result of its September 15, 1995, protest to our Office, as stated in our prior decision, the contract was terminated as a result of the SBA's September 13 determination that PI was not an SDB concern as required by the solicitation. This determination was not prompted by any protest to our Office, and the resulting contract termination thus was not corrective action in response to a protest to our Office. In any event, the contract was terminated on September 29, which is only 14 days after the September 15 protest to our Office and prior to the due date for an agency report on that protest; therefore, even if we would consider the termination to be corrective action in response to that protest, the termination was sufficiently prompt that we would not have awarded protest costs. See Oklahoma Indian Corp.--Claim for Costs, 70 Comp. Gen. 558 (1991), 91-1 CPD ¶ 558.