

DOCUMENT RESUME

02350 - [A1332294]

[Protest against Resolicitation of Contract]. B-188667. May 6, 1977. 3 pp.

Decision re: E. I. L. Instruments, Inc.; by Paul G. Dembling, Acting Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).

Contact: Office of the General Counsel: Procurement Law I.

Budget Function: National Defense: Department of Defense - Procurement & Contracts (058).

Organization Concerned: High Voltage Maintenance Corp.;

Department of the Air Force: Wright-Patterson AFB, OH.

Authority: B-186386 (1976). A.S.P.R. 12-1005.3(b). 55 Comp. Gen. 864. 55 Comp. Gen. 868. 55 Comp. Gen. 715.

A contractor protested resolicitation of an Air Force contract, asserting that competitor's protest was sustained because the contract did not provide a wage determination until after award. This assertion was found to be erroneous, and the prior decision, based on equality of competition, was affirmed. (HTW)

02350 2294

E.P. 11/1
Proc. 11

DECISION



**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

FILE: B-188667

DATE: May 6, 1977

MATTER OF: E.I.L. Instruments, Inc.

DIGEST:

1. Protester's assertion that prior protest of competitor was sustained because protester's contract did not provide Service Contract Act Wage determination until after award is erroneous for it ignores principle being protected in prior decision--equality of competition.
2. Where RFP did not contain wage and fringe benefit determination; protester agreed, before award, to postaward incorporation of any wage determination, but disputed amount and incorporation of new wage determination and argued for inclusion of another wage rate; and incumbent's offer reflected current and anticipated collective bargaining agreement rates, upon which new wage determination was based, there is no basis to conclude that offerors formulated proposals on basis of same information.

E.I.L. Instruments, Inc. (EIL), has protested against the proposed award of a contract for electrical maintenance and repair of equipment at the Air Force Aero Propulsion Laboratory for the period May 16, 1977, through September 30, 1977, resulting from request for proposals (RFP) No. F33601-77-09075, issued by the Department of the Air Force (Air Force), Wright-Patterson Air Force Base, Ohio. The instant RFP was issued on March 10, 1977, in response to our decision in High Voltage Maintenance Corp., B-186386, December 9, 1976, 56 Comp. Gen. _____, 76-2 CPD 473, which sustained the above-captioned firm's (HVM) protest. We made the following recommendation:

"* * * We recommend that the requirements of the 1-year second option be resolicited in a manner consistent with this decision. After negotiating under a new RFP, the option under which EIL is now performing should be terminated for the convenience of the Government and a new contract entered into with the successful offeror, if other than EIL. If EIL is successful, the existing option should be modified in accordance with its final proposal."

EIL is currently performing the same services under the second option of contract No. F33601-76-90312; the option is for the period October 1, 1976 through September 30, 1977. EIL contends that the RFP in question should be withdrawn and that the firm should be permitted to perform for the full duration of the current contract option for the following reasons:

1. GAO's findings and recommendation are contrary to Armed Services Procurement Regulation (ASPR) § 12-1005.3 (1975 ed.), which provides for postaward incorporation of a wage determination.
2. GAO erroneously concluded that HVM and EIL did not formulate their proposals on the basis of the same information; both firms constructed their proposals on the basis of the same RFP, notwithstanding the fact that HVM may have based its computation on a collective bargaining agreement (cba) rate not reflected in the RFP.
3. With just 4-1/2 months remaining on the present contract, the Government will gain very little by terminating the contract and resoliciting its requirements.

EIL erroneously asserts that the HVM protest was sustained because the contract did not provide a wage determination until after award, citing ASPR § 12-1005.3(b) (1975 ed.) which permits postaward incorporation of wage determinations into contracts. This argument ignores the principle which we were protecting under the circumstances, that is, the required equality of competition.

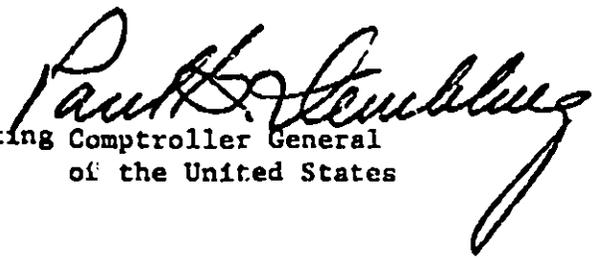
As more fully set forth therein, the decision was based on a situation under which an agency competed a requirement with clear preaward knowledge that a substantive contractual provision (wage determination) bearing materially on the proposed prices was missing from the solicitation. Furthermore, the agency significantly contributed to the absence of the wage determination, was aware of the imminent issuance of that determination, and arranged prior to award for a postaward contract modification.

B-188667

EIL asserts that both offerors formulated their proposals on the basis of the same RFP and that the mere fact that HVM may have based its offer upon the cba rate which was not reflected in the RFP does not support our conclusion that the offerors were not operating under the same information. The RFP gave no indication of the minimum wage and fringe benefits currently applicable to the work to be performed under the resultant contract. EIL agreed prior to the award to accept any wage determination incorporated in the contract by modification or amendment subsequent to award. During the course of the procurement, the applicable wage determination was revised upward; thus, EIL had agreed to an unknown wage rate. EIL subsequently disputed the newly determined rate, in addition to the postaward incorporation of that rate into its contract by arguing for another or so-called "locality" wage determination. HVM's proposal, however, unlike EIL's, reflected the current and anticipated cba rates. Consequently, on the basis of the record, we could not and cannot conclude that the offerors formulated their proposals on the basis of the same information. Because minimum wage and fringe benefit rates are merely one of the factors for the offerors' consideration in formulating their offers, we could not and cannot assume that an increased wage rate will affect all offers equally. Therefore, the appropriate way to determine the effect of a revised wage determination is to compete the procurement under the new rates. See, e.g., Minjares Building Maintenance Company, 55 Comp. Gen. 864, 868 (1976), 76-1 CPD 168; Managers Services Incorporated, 55 Comp. Gen. 715 (1976), 76-1 CPD 168.

Finally, EIL contends that the Government will gain very little by terminating the existing contract and resoliciting its requirements for the remaining 4-1/2 months. At the time of our December 9, 1976, decision, EIL had already completed performance on the base and first option periods of the contract. Consequently, only the second option period was subject to remedial action. For this reason, the Air Force resolicited its remaining requirements under that option period pursuant to our recommendation. In so doing, the Air Force has not claimed that such action is contrary to the best interests of the Government.

Accordingly, the protest is denied and our prior decision is affirmed.


Acting Comptroller General
of the United States