

DECISION

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

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FILE: B-208720.2

DATE: July 13, 1983

MATTER OF: Echelon Service Company

DIGEST:

1. GAO has no objection to ceiling provision in escalation clause providing for prices to be adjusted at the beginning of each option period to reflect changes in the Service Contract Act determinations since use of such a provision appears to be a reasonable exercise of contracting officer's authority.
2. Protest filed well after bid opening, objecting to the agency's failure to postpone bid opening to allow protester to assess the impact of an amendment to the solicitation, is untimely.

Echelon Service Company protests invitation for bids (IFB) No. GS-11C-20229 issued by the General Services Administration for security guard services at two locations in Washington, D.C. The protester contends that a limitation in the solicitation on prices for the option years imposes an unfair burden on small business contractors. Echelon also protests the agency's failure to extend the time for bid opening when the price limitation was amended. The protest is denied in part and dismissed in part as untimely.

The solicitation, which was set aside totally for small businesses, required bidders to quote prices per month for providing guard services for a 12-month base period and for each of two 12-month option periods. Bidders were also required to quote prices per manhour for providing additional services. The solicitation stated that the contract would be subject to the Service Contract Act of 1965, as amended, 41 U.S.C. § 351 et seq. (1976), which provides that every Government contract for the furnishing of services in excess of \$2,500 must require the contractor to pay service employees at a rate not

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B-208720.2

less than the rate prevailing for such employees in the locality, as determined by the Secretary of Labor. The solicitation provided further that in the absence of a wage determination by the Secretary the minimum wage established under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. § 201 et seq. (1976), would apply. An escalation clause in the solicitation provided that the monthly or hourly prices would be adjusted at the beginning of each option period, according to a stated formula, to allow for any change in the wage determination, but that the escalated prices for each option period could not exceed the contract prices for the preceding 12-month period by more than 10 percent. The escalation clause required bidders to warrant that the prices submitted for the option periods did not include any allowances to cover increases in costs for which the escalation clause provided an adjustment.

Prior to bid opening, Echelon filed a protest with this Office complaining that the 10 percent limitation on the increase in the option year contract prices, coupled with the warranty against allowances for increased costs for which an adjustment was provided, exposed prospective contractors to the risk that they might not be able to recover all of the increases in wages that might be required under the Service Contract Act. The day before bid opening, apparently in response to similar protests filed by others but subsequently withdrawn, the agency issued an amendment to the solicitation increasing the option year ceiling from 10 to 15 percent. The protester concedes this amendment reduced, at least partially, the risk imposed on prospective contractors, but, because it received the amendment only hours prior to bid opening, the protester contends that it did not have an adequate opportunity even to consider whether to submit a bid and withdraw its protest. Therefore, the protester did not submit a bid in response to the solicitation as amended. Rather, several days after bid opening, the protester filed an additional protest contesting the contracting officer's failure to postpone bid opening to allow bidders to reconsider their bids in light of the amendment.

The regulations require a contracting officer to include a standard price adjustment clause in fixed-price service contracts that contain options to renew and are subject to the Service Contract Act. Federal Procurement Regulations (FPR) § 1-12.904-3(c). The Standard clause reads, in part, as follows:

"(c) The contract price of contract unit price labor rates for the option or renewal periods of this contract will be adjusted to reflect the Contractor's actual increase or decrease in applicable wages and fringe benefits to the extent that these increases or decreases are made to comply with:

(i) The Department of Labor determination of minimum prevailing wages and fringe benefits applicable at the beginning of the option or renewal period, or

(ii) An amendment to the Fair Labor Standards Act enacted after the award of this contract, affecting the minimum wage, that becomes applicable to this contract under law prior to an option or renewal period.

Any adjustment will be limited to increases or decreases in wages or fringe benefits as described above, and the accompanying increases or decreases in social security and unemployment taxes and workmen's compensation insurance, but shall not otherwise include any amount for general and administrative costs, overhead, or profits."

Paragraph (a) of the regulation states that the purpose of the standard clause is "to permit adjustment of service contract prices for option years * * * so as to eliminate the need for contractors to include contingency allowances in the prices for these periods." The regulation permits a contracting officer to develop alternative price adjustment clauses that accomplish "essentially the same purpose" as the standard clause.

The solicitation in this case did not contain the standard price adjustment clause, but rather a clause that the agency says accomplishes essentially the same purpose as the standard clause. The amended solicitation provided that the prices for each option period could not exceed the contract prices for the preceding 12-month period by more than 15 percent. The agency states that this ceiling is based on the contracting officer's best estimate of the expected increases in the Service Contract Act wage determination. The agency justifies use of this price adjustment limitation by stating that it is intended to combat the excessive wage escalation that is the by-product of the Service Contract Act. That Act was intended to eliminate wage busting, the practice of proposing to hire and actually hiring a predecessor contractor's employees at reduced wages and fringe benefits in order to be the low bidder on a Government service contract. The agency notes that while the Act may have eliminated wage busting, one result of the Act is that contractors have little incentive to bargain over increases in wage rates that are simply passed through to the Government.

The agency notes further that the warranty against allowances for increased costs expressly applies only to those increased costs for which an adjustment is provided. It states that there was nothing in the solicitation to preclude bidders from pricing any contingency not provided for in the escalation clause, and that if a bidder thought that the 15 percent ceiling was inadequate to cover its costs, the bidder could develop a monthly rate to plan for that perceived risk. The agency adds that competitive market forces would tend to keep such contingency allowances to a minimum.

We find no reason to object to the 15 percent ceiling contained in the escalation clause of the solicitation. Both the clause and the regulation upon which it is based reflect a policy determination to pass through to the Government the effects of changes in the wage determinations applicable to the option periods. The ceiling provision obviously places a possible limitation on a total pass-through. However, the regulation provides for the use of alternative provisions, and in the absence of any statutory or regulatory requirement that changes in wage determinations be passed through to the Government in full, we think the escalation clause used here represents

a reasonable exercise of the contracting officer's discretion to develop alternative clauses. We also note that the ceiling apparently had little adverse impact on competition as the agency reports that seven bids were received in response to the IFB.

The protester's other contention, regarding the contracting officer's failure to extend the time set for bid opening when the price adjustment ceiling was raised from 10 to 15 percent, is untimely. This alleged impropriety was apparent from the face of the solicitation as amended; therefore, any protest on this point should have been filed (received) prior to bid opening or as soon thereafter as possible. Because the protest on this issue was filed several days after bid opening, it is untimely and will not be considered. X-Tyal International Corp., B-202100, March 25, 1981, 81-1 CPD 224.

The protest is denied in part and dismissed in part.

for *Harry R. Van Cleave*
Comptroller General
of the United States