DECISION

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

FILE: B-216143 DATE: November 15, 1984

MATTER OF: Aleman Food Service, Inc.

DIGEST:

An incumbent contractor is not placed at a competitive disadvantage when an agency incorporates, by amendment, a current collective bargaining agreement into a solicitation subject to the Service Contract Act, in lieu of a revised wage determination from the Department of Labor not timely received prior to bid opening. Bidders hoping to succeed the incumbent are bound by law to pay their employees the same wages and benefits as are set forth in the collective bargaining agreement, and must therefore compute their costs of performance on the same basis as the incumbent.

Aleman Food Service, Inc. protests the award of any contract under invitation for bids (IFB) No. N68836-84-B-0046, issued as a 100 percent small business set-aside by the Department of the Navy. The procurement is for mess attendant services at Cecil Field Naval Air Station, Florida, and is subject to the provisions of the Service Contract Act of 1965, as amended, 41 U.S.C. §§ 351-358 (1982). Aleman, the incumbent contractor, complains that the solicitation should be canceled because the Navy failed to incorporate therein a revised wage determination from the Department of Labor's Wage and Hour Division. We deny the protest.

Background

Prior to issuing the IFB, the Navy had requested a revised wage determination from the Wage and Hour Division on May 7, 1984. When a response was not received by the time the solicitation was issued on July 17, the Navy

incorporated the old wage determination (No. 74-689 (Rev. -10)), which was based upon a prior collective bargaining agreement between Aleman and its employees' union.

Aleman protested that this particular wage determination was outdated because the firm had entered into a new collective bargaining agreement with the union on March 13. It was Aleman's position that other bidders were unaware of the increased wages to be paid under the new agreement and, therefore, that they would be able to underbid Aleman which was bound by its terms.

In response to the protest, the Navy amended the solicitation to delete the prior wage determination and informed bidders that a revised wage determination had not yet been received. The amendment provided all bidders with a copy of the new agreement for their consideration. Bid opening took place on September 5 as scheduled. On September 12, the Navy received the revised wage determination (No. 74-689 (Rev. -11)). No award has been made pending our resolution of the protest.

Protest and Analysis

The Navy believes that the amendment deleting the old wage determination has rendered the protest moot. To the contrary, Aleman argues that the inclusion of the new collective bargaining agreement in the IFB, in lieu of the revised wage determination, may have worked to the firm's prejudice because there is no guarantee that a successor contractor will recognize the union and be bound to pay the increased hourly rates set forth in the agreement. Therefore, Aleman continues to assert that other bidders may have been able to bid lower since the firm remains bound to pay the higher wages. Aleman also asserts that it is the contracting officer's responsibility to request and obtain a proper wage determination in time to have it included in the solicitation. Consequently, Aleman insists that the present solicitation be canceled and reissued incorporating the revised wage determination.

Section 4(c) of the Service Contract Act, 41 U.S.C. § 353(c), requires that successor contractors pay service employees employed on the contract work the same wages and benefits provided for in a collective bargaining agreement,

reached as a result of arms-length negotiations, to which the employees would have been entitled if they were employed under the predecessor contract. If, after a hearing, the Department of Labor concludes that such wages and benefits are substantially at variance with those prevailing for similar services in the locality, it may issue a new wage determination, at which point the collective bargaining agreement will not apply. No hearing was held in this case, and, in fact, the new wage determination reflects the terms of the collective bargaining agreement.

The purpose of section 4(c) of the Act is to eliminate wage busting, the practice where competing firms propose to hire and actually hire a predecessor contractor's employees at reduced wages and benefits in order to be the low bidder on a government service contract. See Echelon Service Company, B-208720.2, July 13, 1983, 83-2 CPD ¶ 86.

Therefore, Aleman's assertion that its competitors would be able to underbid it because they would not be bound to pay the hourly rates set forth in the new collective bargaining agreement is without foundation. The other bidders, of necessity, would have to take into consideration in their bid calculations the impact of the collective bargaining agreement on their costs of performance. See Geronimo Service Co., B-210342; B-210347, Feb. 16, 1983, 83-1 CPD ¶ 161.

While the Navy erred initially by issuing the solicitation under the old wage determination, this error was corrected in response to Aleman's protest. We see nothing improper, as Aleman suggests, in the incorporation of the new collective bargaining agreement in lieu of the revised wage determination that had not yet been received. As already indicated, bidders were informed through the amendment of the increased hourly rates in the agreement, and were clearly on notice that they should structure their bids accordingly. Geronimo Service Co., supra. Thus, the new collective bargaining agreement served in the same capacity for bid computation purposes as the revised wage determination which, the Wage and Hour Division informs

us, exactly reflects the increased hourly rates set forth in the agreement. We fail to see how Aleman may have been prejudiced by the Navy's action.

The protest is denied.

for Comptroller General
of the United States