Judd Gregg

The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Sunstate International Management Services, Inc.

File: B-227036

Date: July 31, 1987

DIGEST

Where contractor sets conformed wage for employee classification not covered by wage determination, and the Labor Department, after award, makes a final determination that conformed wage was too low, there is no requirement that the government reimburse the contractor for the added cost; bidder must take risk of potentially higher costs into account in formulating bid.

DECISION

Sunstate International Management Services, Inc., protests certain terms of invitation for bids (IFB) No. N62467-85-B-4800, issued March 17, 1987, for the maintenance and painting of family housing at the Naval Air Station, Jacksonville, Florida. In response to Sunstate's protest, the agency issued two amendments that satisfied the first two of the three grounds for Sunstate's protest. Accordingly, Sunstate has withdrawn its protest as to the issues addressed by those two amendments. The protester now only alleges that the solicitation is deficient because it does not, but should, clearly provide that the government will absorb certain potentially higher labor costs under the Service Contract Act of 1965, 41 U.S.C. § 351 (1982).1/ The Navy has postponed bid opening indefinitely pending resolution of the protest. We deny the protest.

The solicitation required the contractor to have on duty at the contractor's field office a maintenance service clerk

---

1/ Sunstate initially protested on the additional ground that the wage determination improperly excluded a wage for one class of employee under the contract. As the Navy responded to this argument in its report, and Sunstate did not rebut the Navy's position in its comments, we consider this allegation abandoned.

dispatcher to receive trouble calls and dispatch appropriate service personnel to correct the problems. The IFB did not include a Department of Labor wage determination for this maintenance dispatcher position. Section I.9 of the IFB did, however, incorporate by reference a clause (required to be included in government contracts subject to the Service Contract Act) establishing a "conforming" procedure to enable the contractor to determine an appropriate wage for the unlisted classification. See 29 C.F.R. § 4.6(b)(2) (1986). This is done by conforming the unlisted classification to some other reasonably related classification listed in the wage determination, and requires the contractor, prior to performance, to compare the knowledge and skill level of workers in the unlisted classification with the knowledge and skill levels of covered workers in establishing a conforming wage. The contractor must report the proposed conformed wages to the contracting officer, who in turn reports to Labor. Labor either approves, modifies, or disapproves the proposed wage or, in the event of a disagreement between the contractor and agency, renders a final, binding determination of the proper wage. Id.

Sunstate's primary concern is that Labor could render a final wage determination for the dispatcher position that is higher than the conformed wage Sunstate calculates in preparing its bid, and that this could result in Sunstate being required to pay higher wages than are built into its bid. Sunstate believes the government must absorb these potentially increased costs through a contract modification, and that the IFB should more clearly provide for such a price adjustment.

We do not agree that the solicitation obligates the Navy to reimburse the contractor for higher labor costs resulting from a Labor determination that the contractor's conformed wage is too low. While the regulations specifically require that employees be paid the higher wage determined by Labor, 29 C.F.R. § 4.6(b)(iv)(C), the regulations nowhere require that the contractor be reimbursed by the government for this increased cost. At the same time, the regulations specifically require the contractor to pay the higher wages (retroactive to the contract start date) and provide that the failure to do so is a violation of the act. 29 C.F.R. § 4.6(b)(v).

Sunstate's interpretation--that the government must reimburse the contractor--is unreasonable, we believe, since it could actually encourage contractors to propose unreasonably low conformed wages. In this regard, if bidders believe they will be reimbursed if Labor ultimately sets a higher wage after the award, bidders may build a low

conforming wage into their bids in order to reduce their bid prices. Although this interpretation would alleviate the risk inherent in the conforming procedure (by shifting it to the government), there is no requirement that the government remove this risk. Some risk is inherent in projecting costs, and bidders are expected to allow for that risk in computing their bids. American Contract Services, Inc., B-225182, Feb. 24, 1987, 87-1 C.P.D. ¶ 203. Any risk here clearly applies to all bidders equally.2/

Sunstate argues that a standard clause incorporated by reference into the solicitation, Defense Acquisition Regulation § 7-1905(b) (DAC 76-20, Sept. 1979), already requires the Navy to pay any difference between the conformed wage and a Labor final determination. The applicable part of this clause states that when the contractor changes the wages of contract employees in response to "an increased or decreased wage determination" otherwise applied to the contract by operation of law, the contract price will be adjusted to reflect the changes. We reject Sunstate's interpretation.

A Labor final determination issues only where no wage determination for a class of employees was included in the contract initially. Such a final determination thus represents not an "increased" wage determination but, rather, a retroactive setting of the initial wage determination based on the procedure incorporated in the contract. It therefore is our view that the clause does not apply to require a contract price adjustment based on a Labor final determination.

We note that our decision here is consistent with the holding in Collins Int'l Service Co. v. United States, 744 F.2d 812, 815 (Fed. Cir. 1984), where the court held in part that the burden of paying for an incorrect wage classification is on the contractor and that, while the

---

2/ We question how much risk is present here since, although the wage determination omits a wage for maintenance service clerk dispatcher, it does include a wage for a motor vehicle dispatcher, a classification the agency states is similar to the maintenance service clerk dispatcher. Further, Sunstate, as the incumbent performing these same services, has actual knowledge of the wages currently being paid these employees.

conforming procedure involves risk, bidders can make allowances in their bids where they are left to apply the procedure.

The protest is denied.

for Seymour Efros
Harry R. Van Cleve
General Counsel