



The Comptroller General  
of the United States

Washington, D.C. 20548

# Decision

**Matter of:** IBI Security Service, Inc.

**File:** B-239569

**Date:** September 13, 1990

Richard Bie Rowe for the protester.  
Mary C. Avera, Esq., General Services Administration, for  
the agency.  
Robert C. Arsenoff, Esq., and John Brosnan, Esq., Office of  
the General Counsel, GAO, participated in the preparation of  
the decision.

## DIGEST

Agency-drafted clause which places a ceiling on recoverable cost increases during option years as the result of Service Contract Act wage rate increases is inconsistent with Federal Acquisition Regulation clause which allows pass-through of the total increase and allows another clause to be used only if it accomplishes the same purpose.

## DECISION

IBI Security Service, Inc. protests invitation for bids (IFB) No. GS-05P-90-GAC-0070, issued by the General Services Administration (GSA) for guard services in the State of Wisconsin. The protester principally objects to the inclusion of a clause which places a 10 percent ceiling on option-year price adjustments for cost increases due to government-mandated increases in wage rates. In IBI's view, the ceiling is inherently restrictive of competition and inconsistent with the Service Contract Act of 1965, 41 U.S.C. §§ 351 et seq. (1988).

We sustain the protest.

The IFB was issued on April 23, 1990, with a bid opening date of May 24. It contemplated the award of a guard services contract, with wages subject to the Service Contract Act, for a base period of 1 year with two successive 12-month option periods. The IFB requested certain per hour and per month prices for the base and option periods. It also included a clause that appears at General Services Acquisition Regulation (GSAR) § 552.222-43, and that in

essence provides for adjustments in the hourly and monthly option prices to reflect any increase or decrease in labor costs resulting from changes in Service Contract Act wage rates applicable to the option periods. The clause also provides that only 95 percent of the monthly and hourly option prices are subject to adjustment; the clause further provides that the adjusted prices may not exceed the prices for the preceding 12-month period by more than 10 percent. Finally, the clause requires bidders to warrant that their prices do not include an allowance for any contingency to cover increased costs for which a price adjustment is provided by the clause.

IBI argues that the ceiling on the recovery of Service Contract Act wage increases in the option years, in combination with the required warranty that bid prices not include contingency allowances for increases in labor rates, is restrictive of competition. The protester also argues that this clause violates the Service Contract Act in that, by imposing the ceiling, GSA is interfering with the Department of Labor's authority to establish wage rates for service employees under the Service Contract Act and with the employer's rights to meaningful collective bargaining.

GSA responds that the Service Contract Act only governs wage rates to be paid to service employees under government contracts. The agency maintains that the clause merely governs what portion of the cost increases are recoverable by the contractor in a price adjustment--something which GSA believes is not covered by the Service Contract Act. Further, the agency explains that Federal Acquisition Regulation (FAR) § 22.1006(c)(1) specifically authorizes contracting agencies to use their own clauses in lieu of the price adjustment clause appearing at FAR § 52.222-43 if they accomplish "the same purpose." The clause set forth at FAR § 52.222-43 also provides for price adjustments to allow for changed wage rates but does not establish a ceiling for such adjustments and, while it states that the adjustment should not include any amount for general and administrative costs, overhead and profit, it does not limit the adjustment to a specific portion of the contract price.

In GSA's view, since the purpose of the FAR clause is to permit the adjustment of prices for option years so as to eliminate the need to include contingency allowances in the option prices, its clause is proper because it accomplishes the same end, albeit to a different degree. Finally, GSA relies on two previous decisions, Echelon Serv. Co., 62 Comp. Gen. 542 (1983), 83-2 CPD ¶ 86, and International Bus. Investments, Inc., B-213723, June 26, 1984, 84-1 CPD ¶ 668, in which we did not object to agency-drafted ceilings

on the amount of labor costs to be recovered through option-year price adjustments.

The two cases cited by GSA concerned previous and substantially similar versions of the clause at issue here, establishing ceilings on the amount of a Service Contract Act wage increase that could be passed through to the procuring agency. In each instance, we recognized that the clause imposed a limitation on the total pass-through; nevertheless, since the applicable Federal Procurement Regulations (FPR) provision (at the time, FPR § 1-12.904-3(c)) permitted the use of alternate provisions accomplishing the same purpose as the standard clause, we concluded that the use of the alternate clause was within the agency's discretion.

We have reexamined the position taken in these two cases in the context of the arguments raised in this protest and, as discussed below, conclude that the clause used by GSA is not authorized by the FAR.<sup>1/</sup>

FAR § 22.1006(c)(1) requires agencies to use a clause appearing at FAR § 52.222-43, entitled "Fair Labor Standards Act and Service Contract Act--Price Adjustment (Multiple Year and Option Contracts)," or "another clause which accomplishes the same purpose." The clause reads in part as follows:

"(c) The wage determination, issued under the Service Contract Act of 1965, as amended, (41 U.S.C. 351, et seq.), by the Administrator, Wage and Hour Division, Employment Standards Administration, U.S. Department of Labor, current on the anniversary date of a multiple year contract or the beginning of each renewal option period, shall apply to this contract. If no such determination has been made applicable to this contract, then the Federal minimum wage as established by section 6(a)(1) of the Fair Labor Standards Act of 1938, as amended, (29 U.S.C. 206)

---

<sup>1/</sup> Among the several decisions of the General Services Administration Board of Contract Appeals (GSBCA) which the agency believes support its use of the ceiling clause, one was relevant to our reexamination: Mr. Klean's Janitor & Maintenance Serv., Inc., GSBCA No. 7613, Jan. 27, 1988, reprinted in 88-2 BCA ¶ 20,716. That decision also involved the agency's use of a ceiling clause under the FPR, but was decided on the basis of our holdings in Echelon and International Bus. Investments, Inc.

current on the anniversary date of a multiple year contract or the beginning of each renewal option period, shall apply to this contract.

"(d) The contract price or contact unit price labor rates will be adjusted to reflect the Contractor's actual increase or decrease in applicable wages and fringe benefits to the extent that the increase is made to comply with or the decrease is voluntarily made by the Contractor as a result of:

"(1) The Department of Labor wage determination applicable on the anniversary date of the multiple year contract, or at the beginning of the renewal option period. For example, the prior year wage determination required a minimum wage rate of \$4.00 per hour. The contractor chose to pay \$4.10. The new wage determination increases the minimum rate to \$4.50 per hour. Even if the Contractor voluntarily increases the rate to \$4.75 per hour, the allowable price adjustment is \$.40 per hour;

"(2) An increased or decreased wage determination otherwise applied to the contract by operation of law; or

"(3) An amendment to the Fair Labor Standards Act of 1938 that is enacted after award of this contract, affects the minimum wage, and becomes applicable to this contract under law." [Emphasis supplied.]

The intent of the underscored language and the example contained in section (d)(1) of the clause is clear--it is to shift from the contractor to the government the costs of government-mandated increases in wages or fringe benefits over what the contractor is paying. The predecessor procurement regulation governing implementation of the Service Contract Act prescribed almost the identical clause concerning labor rates in option periods, and stated explicitly that the purpose of the standard clause was "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." FPR § 1-12.904-3(a). The underlying purpose of the clause is essentially to eliminate the possibility of contractors overestimating future labor rate increases in order to protect themselves and thereby unnecessarily increasing government contract costs.

As we recognized in Echelon and International Bus. Investments, in the case of a prospective contractor subject to a collective bargaining agreement, which governs that contractor's Service Contract Act obligations, the GSA clause might help to eliminate cost increases by encouraging the firm in its labor negotiations to limit wage increases to those within the ceiling included in the GSA clause. While the contractor would be required to pay higher negotiated rates, it would not be reimbursed under its government contract. On the other hand, where a firm anticipates that it will be necessary during collective bargaining negotiations to settle for wage rates that will exceed the ceiling, it may provide for such a contingency in its contract price. In these situations, the GSA clause would not accomplish the same purpose as the FAR clause, which was designed to eliminate such anticipated labor rate increases from offered prices.

For a prospective contractor not subject to a collective bargaining agreement and who must therefore abide by the prevailing wage rates in its locality as determined by the Department of Labor, the GSA clause may also not accomplish the same purpose as the FAR clause. When a prospective contractor believes that its future wage rates will exceed an option year ceiling established by GSA, the firm may include contingencies to cover this possibility in its price.

Obviously, the higher the ceiling on labor rate increases under options, the less likely it is that prospective contractors will include labor rate increase contingencies in their offered prices. When the ceiling was at 15 percent, as it was in Echelon, contractors assume less risk than with the current ceiling of 10 percent, or than they might under a recent GSA proposal to use an 8 percent ceiling.<sup>2/</sup> Nevertheless, we cannot say that any particular level ceiling would reliably and predictably eliminate the possibility of prospective contractors protecting themselves in their offers from future wage increases that might not be recouped through increased option prices. As discussed above, the GSA clause might result in lower government contract costs by influencing collective bargaining in some cases. It does not, however, apply only in such situations and might result in unnecessarily high contract costs in other cases. Accordingly, it is our view that the GSA clause does not "accomplish the same purpose" as the FAR

---

<sup>2/</sup> 53 Fed. Cont. Rep. (BNA) 578 (Apr. 23, 1990).

clause, and we therefore find that the agency had no authority to include the challenged clause in the solicitation. See FAR § 22.1006(c)(1). To the extent that this is inconsistent with our holdings in Echelon and International Business Investments, those cases are overruled.<sup>3/</sup>

In reaching this conclusion, we do not agree with the protester's argument that the Service Contract Act itself is violated by the GSAR clause. The Act itself principally requires the payment of minimum wage rates, as determined by the Secretary of Labor, to service employees under contracts the principal purpose of which are to furnish services to the government. See 41 U.S.C. § 351. The Act does not address the extent to which, if at all, a contractor should be reimbursed by the government as the result of any increase in wage rates during the performance of a government contract. The Department of Labor regulations addressing the effect of Service Contract Act wage determinations on option periods do not address the issue. See 29 C.F.R. § 4.145(b) (1988). Only the FAR provides for a pass-through to the government of increased contractor costs resulting from increases in requested wage rates during option years. We also disagree with IBI's argument that a ceiling clause itself constitutes an impermissible interference with an employer's right to meaningful collective bargaining. In the abstract, a limit on the amount of increased wages that can be passed through to the government in a price adjustment presents a situation no different from that faced by an employer in the private sector who must bear a degree of risk with respect to its

---

<sup>3/</sup> Although the protester does not specifically object to that portion of the GSAR clause which limits the coverage of price adjustments to 85 percent of a contractor's option price, we note that GSA has previously explained that this figure represents the average percentage of labor costs for this type of contract based on its own nation-wide survey. Assuming that the data still supports this estimate, we continue to believe that the agency has a reasonable basis for using the 85 percent figure. See International Bus. Investments, Inc., B-213723, supra.

own labor costs in establishing its contractual prices for goods and services.<sup>4/</sup>

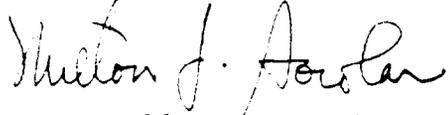
Finally, IBI argues that the portion of the GSAR clause which provides that the contractor warrants that its contract price does not include an allowance for any contingency to cover increased costs for which the clause provides adjustment is objectionable because it does not permit bidders to allow for certain statutorily mandated increases, such as social security tax increases, unemployment tax increases and other unspecified health and welfare tax increases in developing their prices. In our view, however, the warranty provision only applies to wage rates and fringe benefits and, accordingly, a bidder can include contingencies in its price for the types of costs cited by IBI without violating the terms of the warranty.

We sustain the protest because the solicitation does not comply with FAR § 22.1006. In fashioning an appropriate remedy, we note that an award has been made and that performance is proceeding notwithstanding this protest because the guard services are urgently needed. We recommend that GSA promptly resolicit its requirements using a solicitation which is in compliance with the FAR and that the present contract be terminated when an award is made under the new solicitation. We anticipate that this resolicitation action will be completed well before the end of the base period of performance under the present contract and we recommend that, in no event, should the agency exercise any options under that contract.

---

<sup>4/</sup> In this regard, the protester cites Res Care, Inc. et al., 280 NLRB 670 (1986), for the proposition that GSA's use of the GSAR clause impermissibly restricts an employer's discretion in its negotiations with unions so as to preclude meaningful collective bargaining. In that decision, the National Labor Relations Board considered a Department of Labor cost-reimbursement contract to run a Job Corps Center, under which the agency retained control over wage rates and other matters, even including approval of the contractor's hiring policies. The clause used in this fixed-price IFB does not fall within the ambit of Res Care since, even with the 10 percent ceiling on the pass-through, GSA retains no significant degree of control over wage rates paid by the contractor.

We further find that the protester is entitled to be reimbursed for its reasonable costs of filing and pursuing the protest. Bid Protest Regulations, 4 C.F.R. § 21.6(d) (1990).

*for*   
Comptroller General  
Of the United States