Comptroller General
of the United States
Washington, D.C. 20548

Decision

Matter of: Information Handling Services

File: B-240011

Date: October 17, 1990

John F. McIver, Jr., for the protester.
Richard T. Holland for Dataware Technologies, Inc., an interested party.
Roy E. Potter, Esq., United States Government Printing Office, for the agency.
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest is sustained where the procuring agency unreasonably disregarded the Department of Labor's determination that the Service Contract Act was applicable to the agency's procurement and in proceeding to receive proposals in the face of Labor's determination.

DECISION

Information Handling Services protests the Government Printing Office's (GPO) determination that the Service Contract Act of 1965, 41 U.S.C. § 351 et seq. (1988), was not applicable to GPO's request for proposals (RFP) for Program 900-S, "Federal Logistics Data on Compact Disc--Read Only Memory," to support the Defense Logistics Agency's (DLA) modernization of the Federal Catalog System (FCS).

We sustain the protest.

The FCS is a single catalog system for supply data, operated by the Department of Defense (DOD), pursuant to the Defense Cataloging and Standardization Act, 10 U.S.C. § 2451 et seq. (1988). DLA has been delegated the responsibility for collecting and disseminating FCS logistics data. DOD and civilian agencies use FCS to obtain logistics information (such as stock numbers and reference numbers, item names and

control numbers, and interchangeability/substitutability data) to identify, describe, cross-reference, maintain and requisition supplies. DLA currently distributes this information on microfiche. As part of its modernization efforts, DLA seeks to substitute compact disc technology for microfiche. The authority to conduct this procurement was delegated to GPO by DLA.

The RFP, issued November 3, 1989, contemplated the award of a fixed-price contract to convert the FCS from microfiche to compact disc. The RFP as originally issued provided that the Service Contract Act of 1965, 41 U.S.C. § 351 et seq., was applicable. Amendment No. 3 deleted the statement that the contract would be subject to the Service Contract Act and incorporated by reference the standard clause contained at Federal Acquisition Regulation (FAR) § 52.222-20, "Walsh-Healey Public Contracts Act," which provides that any contract for materials or supplies, exceeding $10,000, is subject to the requirements of the Walsh-Healey Act. See 41 U.S.C. § 35 et seq. (1988).1/

On May 4, 1990, the protester, along with the National Standards Association and USA Information Services, Inc., requested that the Department of Labor determine the applicability of the Service Contract Act to the RFP.2/ On May 10, Labor determined, from its review of the RFP statement of work, that the Service Contract Act was applicable to the solicitation and requested that GPO submit to Labor an SF-98, "Notice of Intention to Make a Service Contract."

GPO did not respond to Labor or to the protester or amend the RFP to incorporate the Service Contract Act, and Information

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1/ The Service Contract Act, 41 U.S.C. §§ 351-358, requires contractors performing service contracts with the government to pay minimum wages and fringe benefits, as determined by the Secretary of Labor, while the Walsh-Healey Act, 41 U.S.C. §§ 35-45, provides for payment of minimum wages to employees performing federal contracts for the manufacture or furnishing of materials, supplies, articles and equipment.

2/ Labor has primary responsibility for interpreting and administering the Service Contract Act. See 41 U.S.C. § 353.

Handling protested to our Office on June 12, before the closing date for receipt of proposals.3/ On June 14, GPO received initial proposals, including a proposal from Information Handling, and, on July 18,4/ requested that Labor reconsider its determination that the Service Contract Act was applicable. Labor is presently reconsidering the applicability of the Service Contract Act to this solicitation but has not issued its determination as of the time of this decision.

GPO requests that we dismiss Information Handling's protest because Labor, which has the authority to administer and enforce the Service Contract Act, is considering the applicability of the Service Contract Act to this procurement, and GPO states that it will abide by Labor's final decision in this regard.

Labor is vested with primary responsibility for interpreting and administering the Service Contract Act, see 41 U.S.C. § 353, and we will defer to Labor's judgment as to the applicability of the Service Contract Act, unless Labor's position is clearly contrary to law. B.B. Saxon Co., Inc., 57 Comp. Gen. 501 (1978), 78-1 CPD ¶ 410. Information Handling does not request that we determine the applicability of the Service Contract Act to this procurement; rather, its protest concerns GPO's unreasonable disregard of Labor's determination that the Service Contract Act was applicable and its decision to proceed to receive proposals in the face of Labor's determination.

The regulations implementing the Service Contract Act and Walsh-Healey Act contemplate an initial determination by the procuring agency as to which statute applies to a particular procurement. If the agency believes that a proposed contract "may be subject to" the Service Contract Act, it is required to notify Labor of the agency's intent to make a service contract so that Labor can provide the appropriate wage determination. 29 C.F.R. § 4.4 (1990). If the agency reasonably determines that a contract is not subject to the

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3/ No award has been made.

4/ This was the same date on which GPO submitted a request for dismissal and report on the protest to our Office.

Service Contract Act, then there is no duty on its part to notify Labor or include Service Contract Act provisions in the solicitation. Tenavision, Inc., B-231453, Aug. 4, 1988, 88-2 CPD ¶ 114. On the other hand, if there exists any question or doubt as to the possible application of the Service Contract Act to a particular procurement, the agency is required to obtain Labor's views. 29 C.F.R. § 4.4(a)(1); FAR § 22.1003-7 (FAC 84-56); Hewes Eng'g Co., Inc., B-179501, Feb. 28, 1974, 74-1 CPD ¶ 112.

The record here shows that GPO knew on May 10, more than a month prior to the closing date for receipt of proposals, that Labor was of the view that the Service Contract Act was applicable to this procurement. Despite notice of Labor's views, GPO proceeded to receive initial proposals on June 14 and continued with its procurement. On July 18, the date its report on the protest was due, GPO requested that Labor reconsider its determination.

We find that GPO's failure to adhere to Labor's views as to the applicability of the Service Contract Act to this procurement was unreasonable and in violation of applicable regulations. See 29 C.F.R. § 4.4(a)(1); FAR § 22.1003-7. While GPO disagrees with Labor's views as to the applicability of the Service Contract Act, GPO does not contend that Labor's determination was clearly contrary to law, and Labor's views must prevail.

If an agency is on notice of the possible application of the Service Contract Act to a procurement, the agency should suspend the date for receipt of proposals while the matter is pending before Labor for its determination. See Hewes Eng'g Co., Inc., B-179501, supra. Here, GPO requested reconsideration of Labor's determination of the applicability of the Service Contract Act more than 3 months after Labor's determination and only after proposals were received and this protest was filed. It was unreasonable and in violation of applicable regulations for GPO to have continued the procurement, without submitting an SF-98, in the face of Labor's determination. Id.

We recommend that GPO either (1) suspend all further contracting action on this procurement until Labor issues its determination on GPO's request for reconsideration of the applicability of the Service Contract Act, or (2) submit an SF-98 to Labor in accordance with Labor's determination. GPO should include in the RFP any minimum wage rate determination Labor finds applicable to the contract and solicit revised

proposals from all offerors. Under the circumstances, the protester is entitled to recover its costs of filing and pursuing the protest, including reasonable attorneys' fees. 4 C.F.R. § 21.6(d)(1) (1990). Information Handling should submit its claim for its protest costs directly to the agency. 4 C.F.R. § 21.6(e).

The protest is sustained.

Milton J. Socolar

acting Comptroller General
of the United States