S. Riback

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

Decision

Matter of: Akal Security, Inc.

File: B-244386

Date: October 16, 1991

Donald E. Barnhill, Esq., East & Barnhill, for the protester.
James E. Wilson for Scotlandyard Security Services, Ltd., an interested party.
Amy J. Brown, Esq., General Services Administration, for the agency.
Scott H. Riback, Esq., and John M. Melody, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Solicitation which initially provided that Service Contract Act (SCA) wage-rate determination was not applicable, but which subsequently incorporated SCA wage determination by amendment, is not ambiguous with respect to SCA wage determination applicability; solicitation, when read as a whole, clearly contemplates performance of service contract to which wage determination applies.

2. Where solicitation specifies that patrol vehicles are not required in connection with contract performance, solicitation is not defective for failure to provide detailed information regarding vehicle usage.

3. Protest against solicitation provision relating to annual adjustments of contractor's pricing is denied, where protester's reading of clause--that contractor would be required to pay Fair Labor Standards Act minimum wages in the absence of a SCA wage determination for option periods--is unreasonable in light of solicitation's other provisions.

4. Request for award of bid protest costs is denied where agency corrective action was related to the amendment of a solicitation provision not objected to by protester.

DECISION

Akal Security, Inc. protests the terms of invitation for bids (IFB) No. GS-07-91-DRB-0023, issued by the General Services Administration (GSA) to acquire security guard services for five government buildings in the New Orleans

area. Akal argues that various portions of the IFB are ambiguous. Akal also requests that we award it bid protest costs in connection with one aspect of its protest which it alleges was resolved by agency corrective action.

We deny the protest and the claim for costs.

The IFB requires bidders to submit monthly lump-sum prices for each of five locations for a 1-year base period and two 1-year options. Six amendments have been issued, two of which are germane to the protest. Amendment No. 2 incorporates a Department of Labor (DOL) wage determination in accordance with the requirements of the Service Contract Act (SCA). Amendment No. 6 (issued subsequent to Akal's protest) corrects an error appearing in the "Option to Extend the Term of the Contract" clause of the IFB[1], so that it now provides that the total contract will not exceed 36 months rather than the 60 months originally specified.

Akal maintains that a number of the solicitation's provisions are ambiguous. As a general rule, solicitations must be drafted in a fashion which enable bidders to intelligently prepare their bids and must be sufficiently free from ambiguity so that bidders may compete on a common basis. Toxicology Testing Serv., Inc., B-219131.2, Oct. 28, 1985, 85-2 CPD ¶ 469. We find that the requirements of the challenged provisions of the IFB are clear.

Akal first argues that the IFB's terms relating to the application of the SCA wage determination are ambiguous. The protester notes in this regard that the IFB, as originally issued, included the designation "N/A" in the space provided to indicate the applicable wage determination, and that when the agency subsequently issued amendment No. 2 to incorporate wage determination No. 86-1315 (Rev. 3), it did not delete the N/A designation. According to the protester, the result is an ambiguity as to whether the wage determination is applicable.

In our view, the solicitation, when read in light of amendment No. 2, cannot be reasonably interpreted as leaving any question concerning whether the wage rate determination applies. The sole material change which was made by amendment No. 2 was the addition of the wage determination to the solicitation which, when read as a whole, clearly contemplates the performance of a service contract to which the SCA is applicable. If, as the protester contends, the agency did not intend to make the wage determination applicable to the contract, we are at a loss to understand the

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[1] The clause is the standard provision appearing at Federal Acquisition Regulation (FAR) § 52.217-9.

agency's purpose in issuing amendment No. 2. We therefore conclude that the protester's reading of the solicitation in this regard is not reasonable.

Akal also argues that attachment 3 to the IFB, which contains a provision entitled "Patrol Vehicle Requirements," is ambiguous because the portions of the clause calling for information relating to the vehicles' use in terms of hours per day, days per week and miles per day have been left blank. The agency responds that the IFB contains no specific information as to vehicles because no vehicles are required for contract performance. The agency notes that the "Patrol Vehicles Requirements" clause in attachment 3 to the IFB contains the phrase "not required" at the beginning of the provision, and also points out that section C.9.B.4 of the IFB's statement of work, entitled "Motorized Patrol Equipment," also clearly indicates that motorized patrol vehicles are not required for contract performance. This being the case, the absence of vehicle information is irrelevant.

Akal further argues that the IFB's inclusion of the clause appearing at General Services Administration Regulation (GSAR) § 52.222-43, "Fair Labor Standards Act and Service Contract Act Pricing Adjustment," which provides the basis for pricing adjustments during option years, is improper for two reasons. First, in paragraph "d" of the clause, bidders are advised that, in the event that a SCA wage determination is issued for the base period of the contract but not for the option periods of the contract, adjustments to price will be based upon the increase or decrease in wages and fringe benefits payable under the Fair Labor Standards Act (FLSA) rather than changes in the wages payable under the SCA. According to the protester's reading of this section, should the agency fail to obtain a SCA wage determination for the option periods, then the contractor will be required to pay its employees the minimum wage rates called for under the FLSA rather than SCA wage rates specified for the base year. Second, the clause provides in paragraph "e" that the "pass through" of increases in wages (i.e., the percentage of wage rate increases from 1 year to the next which the government will be liable for) is limited to 10 percent a year. The protester argues that this 10-percent ceiling on price increases is improper because it is at variance with the FAR which permits the unlimited pass through of wage increases to the government.

We find the protester's position regarding GSAR § 52.222-43 to be without merit for three reasons. First, the agency is legally required to obtain a SCA wage rate determination each time it intends to enter into a service contract, and the applicable regulations define the exercise of a contract option as entering into a service contract. FAR

§ 22.1007(b)(1); 29 C.F.R. § 4.4(a)(1) (1990). There is nothing in the record suggesting that the agency will fail to discharge its legal obligation to obtain a wage rate determination for each of the option years under the IFB. Consequently, there is no basis at this time to conclude that the situation which the protester alleges may occur will ever come to pass.

Second, the protester misunderstands the purpose of the clause in question. GSAR § 52.222-43 does not govern the contractual relationship between the contractor and its employees. Rather, it governs the contractual relationship between the agency and the contractor for purposes of determining the contractor's entitlement to payment. The contractor continues to be legally obliged to pay its employees the SCA-mandated wage rates by virtue of the incorporation of FAR § 52.222-41,[2] which provides in pertinent part:

> "[e]ach service employee employed in the performance of this contract by the contractor or any subcontractor shall be paid not less than the minimum mandatory wages and shall be furnished fringe benefits in accordance with the wages and fringe benefits . . . as specified in any wage determination attached to this contract."

That same clause goes on to describe the adjustments to be made to the contractor's employees' wages and benefits in the event that an option is exercised, and a revision is made to the wage determination in connection therewith. Significantly, nothing in that portion of the clause relieves the contractor of its obligation to continue paying its employees in accordance with the original wage rate determination in the event that a modification is not made to it.

In contrast, GSAR § 52.222-43 governs adjustments to the contractor's entitlement to payment under the contract. The clause specifically provides that the contractors' "monthly option prices will be adjusted upward or downward by the contracting officer using the formula in the paragraph (e) of this clause . . . ." In the event that a new wage determination is not obtained for an option year, then the price adjustment is governed by changes in the minimum wages payable under the FLSA. However, a change in the contractor's prices does not relieve it of its obligation to

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[2] See also, Allen-Norris-Vance Enters., Inc., B-243115, July 5, 1991, 91-2 CPD ¶ 23 (clause requires contractor to abide by SCA and terms of any applicable wage rate determination).

pay its employees in accordance with the prior year's wage rate determination. The protester's interpretation of this clause is simply erroneous and cannot be viewed as reasonable within the context of the IFB when read in its entirety.

Finally, with respect to the ceiling upon increases in the contractor's prices under GSAR § 52.222-43, we note simply that GSA has, pursuant to FAR § 1.404, obtained a valid class deviation from the terms of the FAR which our Office has found proper. General Servs. Admin.--Recon., B-239569.2, Feb. 13, 1991, 91-1 CPD ¶ 163. Consequently, we have no basis to object to the agency's use of the clause here.

Finally, Akal initially argued that the solicitation's terms relating to the overall duration of the contract were misleading. In particular, the protester argued that while section B of the IFB called for a 12-month base period and two 12-month options for a total contract period of 36 months, elsewhere in the IFB, the clause appearing at FAR § 52.217-8, "Option to Extend Services," provides that the total extension of performance shall not exceed 6 months. The protester initially argued that these conflicting provisions left bidders uncertain as to the total possible duration of the contract. Subsequently, the agency issued amendment No. 6 to correct an error in another provision of the IFB that had not been mentioned by the protester, specifically, the clause under FAR § 52.217-9, entitled "Option to Extend the Term of the Contract." That clause had stated that the total possible duration of the contract was 60 months; the amendment corrected the provision to read 36 months. The protester now argues that this change constituted corrective action that entitles it to reimbursement of the costs of filing and pursuing its protest under our Bid Protest Regulations, 56 Fed. Reg. 3759 (1991) (to be codified at 4 C.F.R. § 21.6(e)).

Akal is not entitled to reimbursement because its protest on this ground was baseless. The terms of section B and FAR § 52.217-8 are not inconsistent. Section B defines the overall potential term (with options) of the contract as 36 months; FAR § 52.217-8 merely provides the agency with a right to seek up to an additional 6 months of contract performance beyond the 36-month period where exigent circumstances (such as delay in award of a follow-on contract) create the need for continued performance. See FAR § 37.111. The agency's actions in changing the FAR § 52.217-9 clause to be consistent with section B addressed an inconsistency different than the one on which Akal's protest was based, and thus did not constitute corrective action that could give rise to an entitlement to costs. Under these

circumstances, we will not award bid protest costs. See Durodyne, Inc.--Request for Declaration of Entitlement of Costs, B-243382.4, Aug. 27, 1991, 91-2 CPD ¶ 199. In any event, the prompt nature of the agency's actions here, taken before the filing of its report, would preclude an award of costs even if we concluded that the amendment had been issued in response to the protest. See Pulse Elecs., Inc.--Claim for Costs, B-243838.2, Aug. 19, 1991, 91-2 CPD ¶ 164.

The protest and claim for costs are denied.

for James F. Hinchman
General Counsel