

Pogany



Comptroller General
of the United States

122877

Washington, D.C. 20548

REDACTED VERSION

Decision

Matter of: Carolina Stevedoring Company

File: B-260006

Date: May 18, 1995

Anne E. Mickey, Esq., Marc J. Fink, Esq., and Cindy G. Buys, Esq., Sher & Blackwell, for the protester. Herbert M. Wasserman, Esq., for Northport Handling, Inc., an interested party. Michael G. Skennion, Esq., and William J. Dowell, Esq., Department of the Army, for the agency. Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Where the contracting agency is awarding a fixed-price contract for services for a base and option years, and the successful contractor is bound by the contract to pay its employees the wages required by present and future wage determinations, the General Accounting Office will not disturb an award even if an offeror has proposed line item labor rates or has furnished cost data showing proposed labor rates below those specified in a Service Contract Act (SCA) wage determination if the firm is otherwise deemed to be responsible. Further, whether the contractor performs the contract in accordance with the SCA is a matter for the Department of Labor, which is responsible for the enforcement of the SCA.

2. Protest is denied where the protester fails to show that agency miscalculated proposals and misidentified the likely most advantageous offeror, a non-union firm, in selecting the firm for award in contract for stevedoring services at a port.

DECISION

Carolina Stevedoring Company protests the award of a contract to Northport Handling, Inc. under request for

The decision issued on May 18, 1995, contained proprietary information and was subject to a General Accounting Office protective order. This version of the decision has been redacted. Deletions are indicated by "[deleted]."

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proposals (RFP) No. DAHC24-93-R-0014, issued by the Military Traffic Management Command (MTMC), Department of the Army, for loading and unloading the cargo of ships at port and related terminal services at Blount Island Terminal, Jacksonville, Florida. The protester principally contends that the agency, after conducting a detailed cost analysis of price proposals, miscalculated these price proposals by knowingly accepting Northport's offer which proposed wage rates for the option years substantially below the applicable collective bargaining agreement (CBA) contained in the solicitation, resulting in unequal competition and in offerors submitting proposals on different bases.

We deny the protest.

BACKGROUND

The RFP

The RFP, issued on January 14, 1994, contemplated the award of a fixed-price, indefinite quantity contract for a base period of 2 years with two 1-year priced options.¹ The RFP's schedule generally requested fixed unit and extended prices for the base and option years for estimated quantities of specified commodities loaded or unloaded, such as per vehicle, per container, or per measurement ton of cargo; however, the schedule also requested prices for certain man-hour rates, such as straight time rates for extra labor for foremen, longshoremen, and mechanics (including automated rates, breakbulk rates, and explosive differential rates).

The RFP stated that the government would award one contract covering all services and that offers would be evaluated for award on the "basis of the overall gross dollar amount of

¹The RFP, as amended, established the 2-year base performance period as March 1, 1995, through February 28, 1997. The two 1-year options could then be exercised by the agency at the prices contained in the RFP's schedule for these option years. A third option year, not priced or evaluated, could also be exercised by the agency "in any [time] increments" up to 1 year at the prices in effect at the date of the extension.

all Schedules."² The RFP contained no technical evaluation criteria for comparative evaluation of technical proposals.

Pursuant to the Service Contract Act (SCA), 41 U.S.C. § 351et seq. (1988), the RFP, as amended, contained the following provision:

"An SCA wage determination applicable to this work has been requested from the U.S. Department of Labor. If an SCA wage determination is not incorporated herein, the bidders/offerors shall consider the economic terms of the collective bargaining agreement (CBA) between the incumbent Carolina Stevedoring, Inc. and the International Longshoremen's Association [ILA]. . . . [T]he economic terms of that agreement will apply to the contract resulting from this solicitation, notwithstanding the absence of a wage determination reflecting such terms."³

²The protester argues that the RFP failed to incorporate Federal Acquisition Regulation (FAR) § 52.217-5 which provides that "the Government will evaluate offers for award purposes by adding the total price for all options to the total price for the basic requirement," and that the agency could therefore not evaluate options for purposes of award. However, the solicitation clearly required offerors to submit prices for three sets of schedules: (1) the base period of 2 years; (2) option year one; and (3) option year two. Thus, even without the inadvertently omitted clause, the RFP's stated price evaluation methodology (award on the basis of the "overall gross dollar amount of all Schedules") clearly conveyed to offerors the agency's intent to include option years prices in its evaluation. Further, the contracting officer, in a pre-proposal conference that all offerors attended, advised the protester and other participants that the base and 2 option years would "be used to make the final evaluation of contract award." We therefore find no merit in the protester's contention and also find that no firm was misled by the absence of the FAR clause. In this regard, contrary to the protester's argument, we also accept the contracting officer's written determinations and findings, which was executed after the issuance of the solicitation, that the services required were of a recurring nature and that therefore the government would be reasonably likely to exercise the options.

³The agency states that the Department of Labor (DOL) did not properly respond to its request for a wage determination and that therefore the terms of the CBA were applicable to this solicitation. The protester, Carolina, is the

(continued...)

The RFP also stated as follows:⁴

"Successor Contracts. If this contract succeeds a contract subject to the [SCA] under which substantially the same services were furnished in the same locality and service employees were paid wages and fringe benefits provided for in a collective bargaining agreement. . . neither the Contractor nor any subcontractor shall pay any service employee performing any of the contract work (regardless of whether or not such employee was employed under the predecessor contract), less than the wages and fringe benefits provided for in such collective bargaining agreement, to which such employee would have been entitled if employed under the predecessor contract, including accrued wages and fringe benefits and any prospective increases in wages and fringe benefits provided for under such agreement."

³(...continued)

incumbent contractor and is a party to a CBA between the Jacksonville Maritime Association (JMA) and the local ILA, AFL-CIO, that was executed on November 4, 1991, and which was effective for a period of 2 years from 1991 through 1993. The latest extension of the CBA was agreed upon on between these parties on October 28, 1993, and the wages contained therein will be in effect pursuant to the extended CBA until September 30, 1996. The base period of performance under this RFP ends on February 28, 1997. The RFP also stated that if the term of the contract is more than 1 year, the wages and fringe benefits required to be paid shall be subject to adjustment after 1 year and not less than once every 2 years pursuant to new wage determinations issued by the DOL. DOL regulations consider the exercise of an option to be a "new contract" for purposes of a wage determination. Specifically, DOL generally issues a new wage rate determination when any option extending the term of a contract is exercised by an agency. The contractor is bound to follow the new wage rate determination for each succeeding option period. See 29 C.F.R. §§ 4.143 and 4.145 (1992). Further, under FAR §§ 52.222-43 and -44, which were contained in the RFP, the wage determination current at the beginning of each renewal option period applies to the contract and "[t]he contract price or contract unit price labor rates will be adjusted to reflect increases or decreases by the Contractor in wages and fringe benefits" resulting from "an increased or decreased wage determination."

⁴The provision is found at FAR § 52.222-41, and was incorporated by reference into the RFP.

That same RFP clause clearly contemplated the creation, renewal, modification, and extension of any CBA during later periods of contract performance:

"[If a CBA] is or will be effective during any period in which the contract is being performed, [a report must be given to the contracting officer]. Such report shall be made upon commencing performance of the contract, in the case of collective bargaining agreements effective at such time, and in the case of such agreements or provisions or amendments effective at a later time during the period of contract performance such agreements shall be reported promptly after negotiation thereof." (Emphasis Added.)

The RFP also contained a "Revision of Prices" clause which was independent of the SCA clauses and which stated that prices fixed in the contract were based on wages established by CBAs and were subject to negotiation to increase or decrease the prices because of certain changes in conditions occurring after the contract was awarded.⁵ For purposes of possible future reimbursement of a contractor under the "Revision of Prices" clause, the RFP here required offerors to furnish detailed cost breakdowns, including all direct labor, wage rates and fringe benefits, indirect labor, overhead, and equipment costs, and profit for each unit price. The purpose of requiring this information was to form the "basis for any price adjustment" in the future, including increased wages. The RFP also stated: "'All offerors' 'best and final' proposals must be based on the wages, fringe benefits, payroll tax rates and insurance rates in effect on the date of the contract."

RECEIPT AND EVALUATION OF OFFERS

The agency received four initial proposals on February 14, 1994, including proposals from Carolina and Northport. Carolina was the low offeror at [deleted]; Northport was second low at [deleted]. Since the agency received detailed cost breakdowns on labor rates from each offeror, the agency states that, among other things, "[w]ages and fringe benefits were compared to the current collective bargaining agreement for accuracy."⁶ The agency's analysis of

⁵We discuss this clause in more detail below.

⁶Carolina's current CBA contains the following applicable wage rates:

Container Wage: \$21.00 straight time/\$31.50 overtime
(continued...)

Northport's initial proposal revealed, among other things, that:

"[Deleted]."

The agency decided to hold discussions with the offerors. Of relevance here, the agency during discussions advised Northport to use the Carolina CBA automated wages and fringe benefits.⁷ Best and final offers (BAFO) were received on May 6, 1994. [Deleted].

[Deleted].

"The current hourly wage and fringe benefits rates at Jacksonville are, respectively \$21.00 and \$9.20 for all services provided under the contract. General provision I.38 of the subject solicitation is the Service Contract Act of 1965, as amended (FAR 52.222.41), which states that in the absence of a wage determination, any service employee performing any of the contract work shall not be paid less than the wage and fringe benefits rates currently being paid. [Deleted]."

[Deleted]. The agency then decided to reopen discussions and solicit a second round of BAFOs. During these discussions, Northport was again advised that the government did "not contemplate any work under the upcoming contract for which rates lower than the \$21.00 hourly wage and \$9.20 hourly fringe benefits would be applicable"; the agency also specifically requested Northport to submit a "written affirmation of its intent to comply with" the SCA.

⁶(...continued)

Breakbulk Wage: \$16.50 straight time/\$24.75 overtime

The fringe benefits are:

Container Hours: \$9.20

All other hours: \$8.70

In addition, the CBA provides for additional pay when the workers are handling ammunition cargo.

⁷While breakbulk and automated wages are contained in the incumbent's CBA, the contracting officer states that automated wages, which are payable when working on containerships and roll-on/roll-off vessels, applied to all work performed by Carolina under its current contract with the agency.

Revised BAFOs were received on August 26, 1994, with the following results:

	<u>Carolina</u>	<u>Northport</u>
Base Years	\$3,272,960	\$3,450,922
Option Years 1 & 2	3,273,304	2,493,363
Total	6,546,246	5,944,286

The agency evaluated the revised BAFOs; as shown above, Carolina's price was low for the base years while Northport's option years price was substantially lower than Carolina's option years price. The contracting officer states that although Northport "did not provide a written statement of intent" to comply with the SCA as specifically requested by the agency, the contracting officer found that Northport's revised prices for the base period only "reflected use of the automated wages and fringe benefits called for in the CBA." For the option years, Northport again provided cost documentation to the agency showing that it priced its labor substantially below the CBA rates.⁸

The contracting officer accepted Northport's revised BAFO, even though it was not based on CBA rates for the option years, because Northport had submitted "some evidence," that is, the non-union labor agreement, that a non-union labor pool may be available in the Jacksonville area when the options will be exercised. The contracting officer also was advised by counsel that options are "new contracts" under the SCA and that any new wage determinations would be binding on the contractor when the options are exercised; thus, the agency believed that Northport's pricing could not be "construed as evidence of intent to violate [the SCA]." This protest followed award to Northport.

⁸In support of its wage estimates for the option years, Northport also submitted an alleged "Labor Agreement Non-Union Longshoremen Effective [deleted]" (expiring [deleted]) with its revised BAFO. This "non-union agreement" provides base wages for longshoremen of [deleted] straight time and [deleted] overtime, and fringe benefits of [deleted]. The wages are "subject to negotiation if the contract is extended." The non-union agreement is signed by [deleted] as "contract manager" and [deleted] as "labor rep." The agency's pre-award survey identifies these individuals as "key personnel" of Northport. Neither Northport nor any other entity is identified in the "non-union agreement." The protester maintains that this non-union agreement is a "sham."

SUMMARY OF PROTESTER'S CONTENTION

Briefly, the protester argues that the agency's award of the contract to Northport was unreasonable because Northport's proposal clearly evidences an intent to violate the SCA, and contains a "sham labor agreement" to support underpriced wages and fringe benefits in the option years. The protester also argues that the agency's evaluation was flawed because the agency will have to reimburse Northport for increases in wages during the option years and because Northport's proposal places on the agency the risk of finding a non-union labor pool in the future willing to work at non-CBA rates. The protester also argues that the agency failed to ensure that firms were competing on an equal basis by knowingly allowing Northport to deviate from SCA requirements.

ANALYSIS

Where the contracting agency is awarding a fixed-price contract for services for a base and option years, and the successful contractor is bound by the contract to pay its employees the wages required by present and future wage determinations, we see no reason to disturb an award even if an offeror has proposed line item labor rates or has furnished cost data showing proposed labor rates below those specified in a wage determination if the firm is otherwise deemed to be responsible. See Solid Waste Servs., B-248200.4, Nov. 9, 1992, 92-2 CPD ¶ 327; NKF Eng'g, Inc; Stanley Assocs., B-232143; B-232143.2, Nov. 21, 1988, 88-2 CPD ¶ 497. We do not find in the record any showing by the protester that Northport will not be bound to pay its employees in accordance with present and future wage determinations.⁹ Further, whether Northport performs the

⁹Contrary to the protester's argument, we also do not necessarily find an intent to violate the SCA by Northport's submission of below-CBA line item prices for the option years because, among other things, the RFP permitted offerors to "'No Charge' [any line] item [without relieving] the contractor from the requirement to provide the service or comply with other provisions of the contract, applicable law or regulation." While the protester is correct that Northport furnished the agency with detailed cost data showing that it intended to pay below-CBA wages for the option years based on locating non-union labor at that time, the protester does not dispute that an option period is a "new contract" within the meaning of DOL regulations and that any new wage determination for the option periods may conceivably reflect wages below the current Carolina CBA rates. Thus, the protester's allegation that Northport

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contract in accordance with the SCA is a matter for the Department of Labor, which is responsible for the enforcement of the SCA. Taft Broadcasting Corp., B-222818, July 29, 1986, 86-2CPD ¶ 125; NKF Eng'g, Inc.; Stanley Assocs., supra.

The protester, which was low for the base period, argues, however, that Northport will be able to recover from the agency future wage increases up to or exceeding the current CBA level under the RFP's "Revision of Prices" clause. Thus, the protester essentially argues that Northport was not the true low offeror in the aggregate because Northport can recoup and be reimbursed for its below-CBA option year rates. We disagree.

The RFP's "Revision of Prices" clause, which is independent of and separate from the SCA clauses, states that the contractor may be eligible for reimbursement for a "wage adjustment" which is defined as a "change in the wages, salaries or other terms of employment" which (1) substantially affects the cost of performing the contract; (2) is generally applicable to the port where work is performed; and (3) applies to operations by the contractor under the government and non-government work at the same port.

The agency explains the purpose of this clause as follows:

"This clause in its original form was established in 1947, to apply exclusively for stevedoring contracts. The clause reflected the power of the longshoremen's unions to dictate wages that stevedoring firms and vessel operators were required to pay at the ports. In the case of Atlantic and Gulf coast ports, this union is the International Longshoremen's Association (ILA). [The agency] currently maintains contracts [at] most Atlantic and Gulf ports. Historically all stevedoring firms competing for Department of Defense business at these ports have been organized by locals of the ILA, with a few non-ILA competitors appearing only in recent years. These exceptions to the ILA's near monopoly are [Northport] which is our (nonunion) contractor at Jacksonville and Cape Canaveral [and one other firm at New Orleans]."

⁹(...continued)
intends to violate a future unissued wage determination is speculative.

The protester has not shown that the agency, by accepting Northport's proposal, bears an unreasonable risk of finding a non-union labor pool in the future. The agency states as follows:

"The Revision of Prices clause specifically addresses changes in wages and working conditions provided for by CBAs. For a nonunion contractor such as [Northport], its ability to obtain price revisions for any wage increase to its employees is problematical. So long as Northport's dock workers remain unorganized by the ILA, it is unlikely that any wage increases they receive from Northport would be a 'wage adjustment' of general application throughout the port of Jacksonville. The Revision of Prices clause does not recognize discretionary wage increases within the control of the contractor, but only wage increases of general application throughout the port which are beyond the contractor's control or responsibility."

The protester is effectively asking our Office to preclude award by the agency to a non-union contractor proposing non-union wages for option years because of possible reimbursement of future wage increases for employees of the non-union contractor under the "Revision of Prices" clause. That clause, however, specifically provides for upward adjustment of contract prices which are due to wage increases of employees of a contractor that are "based [on] collective bargaining agreements." Thus, the clause is designed to protect unionized contractors from increases in CBAs which are unforeseeable and uncontrollable where the unionized contractor initially proposed current CBA rates. The clause, in our view, would not, however, allow a non-union contractor to "get well" in the option years after knowingly proposing below CBA rates initially for these option years. Northport's dock workers will be fully protected by future wage determinations and will be paid the applicable prevailing wages as determined by the Department of Labor but the fact that the wages paid might exceed the prices agreed to by Northport would not trigger a price revision under the clause's terms. We therefore conclude that Northport assumed the risk of its below CBA option year rates--it will simply have to absorb any losses it may

incur. Accordingly, we will not disturb the contracting officer's business decision to award to a non-union contractor at below CBA rates for the option years.

The protest is denied.

Robert P. Murphy
General Counsel