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Eileen Pettit Proc. I

DECISION

THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-186386 DATE: December 9, 1976

MATTER OF: High Voltage Maintenance Corp.

DIGEST:

1. Post-award protest that Department of Labor (DOL) Service Contract Act (SCA) wage determination attachment was omitted from RFP, involving a deficiency apparent before closing date for receipt of proposals, is untimely but presents issue of widespread interest concerning frequent SCA procurements and will be considered on merits as significant issue under 4 C.F.R. § 20.2(c) (1976).

2. Department of Labor's interpretation of Service Contract Act filing requirements and application of wage determinations to solicitation and contract, as interpretation of regulations by issuer, is accorded great deference.

3. In view of (1) agency knowledge for over 3 weeks before award that wage determination was to be issued in close proximity to anticipated award date; (2) agency's failure to include incumbent's collective bargaining agreement with Department of Labor (DOL) SF 98 significantly contributed to delay in issuance of new wage determination for inclusion in RFP; (3) agency made preaward arrangement with successful offeror to accept expected wage determination, and modification was issued; and (4) DOL view that closing date should have been postponed when agency was notified that wage determination would be delayed: contract awarded was different from contract solicited. Therefore, requirements covered by current option should be resolicited.

4. Time and materials portion of contract which did not contain ceiling price was formulated in contravention of ASPR § 3-406.1(c) (1975 ed.), which makes use of ceiling price mandatory condition in this method of contracting.

High Voltage Maintenance Corp. (HVM) protests the award of contract No. F33601-76-90312 by the Department of the Air Force (Air Force), Wright-Patterson Air Force Base, Ohio, to E.I.L. Instruments, Inc. (EIL), for electrical maintenance and repair of equipment at the Air Force Aero Propulsion Laboratory, resulting from request for proposals (RFP) No. F33601-76-09244.

A single contract was to be awarded for all the items. The RFP provided that items IA and IE (straight time rates for three personnel, and the data to be delivered during the basic period) would be awarded on a firm-fixed-price basis; items IB, IC and ID (on-call rates for straight time and overtime, and estimated materials and subcontracting) would be awarded on a time and materials-type basis. The term of the contract, April 5, 1976, through June 30, 1976, could be extended for a first option period of July 1, 1976, through September 30, 1976, and a second option period of October 1, 1976, through September 30, 1977; offerors were requested to submit offers for the base, first option, and second option periods.

With respect to evaluation and award, the RFP stated that award would be made to the "responsible offeror whose offer conforming to the solicitation will be most advantageous to the Government, price and other factors considered" and that "award will be made in the aggregate to the low responsive and responsible offeror." Further, the RFP cautioned that "[t]he Government may award a contract, based on initial offers received, without discussion of such offers." The RFP and resulting contract incorporated by reference the provision applying the Service Contract Act of 1965 (41 U.S.C. § 351 et seq. (1970)) (SCA) to the procurement as required by ASPR § 7-1903.41(a) (1975 ed.); the RFP did not, however, contain a Department of Labor (DOL) SCA wage determination.

According to the Air Force, HVM, the incumbent contractor, had performed services "substantially the same" as those to be performed under the protested contract, although the instant contract additionally includes "on-call" services. DOL wage determination No. 72-172 (Rev. 3), which set forth the wage and fringe benefits reflected in a collective bargaining agreement (cba) between HVM and its employees, was applicable to the prior contract. A new cba, effective June 1, 1975, existed at the time the previous contract expired.

On January 22, 1976, the Air Force submitted a Standard Form (SF) 98, "Notice of Intention to Make a Service Contract and Response to Notice," to DOL. 29 C.F.R. § 4.4 (1975); ASPR § 12-1005.2(a) (1975 ed.). The RFP, issued on February 27, 1976, required that proposals be submitted by March 18, 1976. Of 11 proposals solicited, the Air Force received only those of HVM and EIL, which were considered to be within the competitive range. On April 2, 1976, award was made to EIL, the low offeror.

HVM essentially contends that Air Force violations of procurement law and regulations in making the award necessitate cancellation of EIL's contract and resolicitation of the Government's requirements, on the following grounds:

1. The award violated the SCA, ASPR §§ 12-1005 and 7-1903.41(a) (1975 ed.) because neither the RFP nor the contract included a wage and fringe benefit determination by DOL.

2. The contracting officer failed to conduct discussions with the offerors.

3. The award to EIL was illegal because the RFP lacked sufficient evaluation criteria.

4. EIL did not submit the cost or pricing data required by the RFP.

HVM asserts that the award to EIL violated the SCA and implementing regulations because neither the RFP nor the contract included a DOL wage and fringe benefit determination. The Air Force contends that the absence of a wage determination attachment from the RFP was apparent before the proposals were to be submitted, and that a protest on this ground filed subsequent to award of the contract is, therefore, untimely, citing section 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. Part 20 (1976). Because HVM's protest was filed after the closing date for receipt of initial proposals, omission of the wage determination attachment from the RFP as a ground of the protest is untimely.

We have determined, however, that this ground of the protest should be considered on the merits because it raises an issue which "goes to the heart of the competitive procurement process." Willamette-Western Corporation; Pacific Towboat & Salvage Co., 54 Comp. Gen. 375 (1974), 74-2 CPD 259. The frequency of SCA procurements and DOL's position in recent, related protests before this Office (discussed below) evidence the presence of a "principle of widespread interest" requisite to a "significant issue," within the exceptions to the timeliness rule under 4 C.F.R. § 20.2(c) (1976). Fairchild Industries, Inc., B-184655, October 30, 1975, 75-2 CPD 264; Ibid.; 52 Comp. Gen. 20, 23 (1972).

The Air Force submitted an SF 98 to DOL on January 22, 1976; but no determination had been communicated to the Air Force by February 27, 1976, the date the RFP was issued. A determination had not been issued by the closing date for receipt of proposals, March 18, 1976. Nevertheless, in a letter, dated April 1, 1976 (the day before award), confirming a telephonic conversation of that date with the Air Force, EIL acknowledged, in pertinent part, that:

> "* * * It is understood that a Wage Determination was inadvertently left out of the * * * solicitation. E.I.L. will, of course, accept any Wage Determination which is offered as an amendment or modification to the contract.
>
> "It is also understood that in the event the determination is higher than the actual wage paid our personnel the Government will then re-adjust the hourly rate accordingly."

Written communication of DOL's new wage determination (No. 72-172, Rev. 4), issued March 31, 1976, was not received by the Air Force until April 2, 1976--15 days after the closing date for receipt of proposals, and, according to the Air Force, "several hours after the award." We observe here that the new wage determination was based on the cba which existed at the time the prior contract expired and contained increased wage rates.

By letter of April 23, 1976, the Air Force requested DOL's guidance in administering the protested service contract because the agency had received DOL's new wage determination subsequent to award. In reply, DOL, by letter dated July 30, 1976, noted that, although the Air Force had timely filed the SF 98, the delay in issuing wage determination No. 72-172 (Rev. 4) was because DOL subsequently discovered that HVM, the incumbent

contractor, was a party to a cba. DOL had advised the Air Force of this discovery on March 10, 1976 (8 days prior to the closing date for receipt of initial proposals), and on that date had requested a copy of the cba. The agency supplied the information by letter of March 12, 1976. DOL did not receive a copy of the cba until March 19, 1976, the day after the closing date. Consequently, although the Air Force had timely filed the SF 98 more than 30 days prior to issuance of the RFP, the agency failed to comply with the regulatory requirements for filing the SF 98. 29 C.F.R. § 4.4(c) (1975) provides in pertinent part:

> "If the services to be furnished under the proposed contract will be substantially the same as services being furnished for the same location by an incumbent contractor * * * [who] is furnishing such services through the use of service employees whose wage rates and fringe benefits are the subject of one or more collective bargaining agreements, the contracting agency shall file with its Notice of Intention to Make a Service Contract (SF 98) a copy of each such collective bargaining agreement together with any related documents specifying the wage rates and fringe benefits currently or prospectively payable under such agreement. * * *" (Emphasis added.)

In fact, the submitted SF 98 was misleading in this regard. The space provided on the SF 98 for information on any applicable cba for then current performance was completed as not applicable and no cba, as required, was attached even though the Air Force knew that HVM was performing the prior contract under a wage determination based on a cba. While the Air Force argues that diligent efforts to obtain a wage determination from DOL were evident, under the above circumstances, it is our view that the Air Force's incomplete and misleading filing of the SF 98 significantly contributed to the delay in the issuance of the new wage determination.

The Air Force cites ASPR § 12-1005.3(a) (1975 ed.), which requires that:

> "The * * * request for proposals actually issued, as well as any contract entered into, in excess of $2,500, shall contain an attachment setting forth the minimum wages and fringe benefits specified in any applicable currently

effective determination, including any
expressed in any document referred to in
* * *

"(i) any written communication from the Administrator, responsive to the notice (SF 98) required by 12-1005.2(a); however, such communications received by the Federal agency later than 10 days before the date established for the initial receipt of proposals shall not be effective except where the agency finds that there is a reasonable time to notify * * * offerors thereof;

"(ii) any revision of the wage determination prior to the award of the contract * * * however, revisions received by the Federal agency later than 10 days before * * * the date established for the initial receipt of proposals shall not be effective except where the agency finds that there is a reasonable time to notify * * * offerors of the revision."

On this basis, the Air Force takes the anomalous position that the wage determination was not effective for the contract, notwithstanding the fact that the agency had obtained EIL's agreement in advance of making the award to incorporate a determination in the contract as a modification or amendment. Further, on June 11, 1976, the Air Force issued modification M002, paragraph B of which incorporated wage determination No. 72-172 (Rev. 4) into the existing contract.

Moreover, DOL, in its letter of July 30, 1976, in response to the Air Force's post-award inquiry, advised the Air Force, in effect, that the closing date for receipt of proposals should have been postponed based upon DOL's March 10, 1976, notice that the pertinent SF 98 did not contain requisite supporting information and would necessitate delay in processing the required wage determination. Because the Air Force had already made the award. DOL exhorted prompt amendment of the EIL contract in order to incorporate wage determination No. 72-172 (Rev. 4) "retroactively to the contract commencement date." During the interim between the Air Force's inquiry and DOL's reply, the Air Force had decided to exercise the first option under the contract. The Air Force was, therefore, required to submit another SF 98 to DOL prior to exercising this option; each option is treated, for the purposes of the SCA, as a new contract. ASPR § 12-1005.8(b) (1975 ed.). In this regard,

DOL advised the Air Force that incorporation of wage determination 72-172 (Rev. 4) into the contract option period was inappropriate; rather, wage determination 76-762, issued July 20, 1976, "should be incorporated retroactively into the July 1 contract option period." We note, however, that while the authority for the issuance of these determinations was different, the wage rates and fringe benefits prescribed by both determinations were identical.

In considering the requirements for filing the SF 98 and incorporation of the wage determination in the solicitation and resultant contract, we must accord great deference to DOL's interpretation of regulations which it issued pursuant to valid authority. Mayfair Construction Company, B-186278, August 10, 1976, 76-2 CPD 148. Furthermore, DOL has taken a similar and consistent position with respect to recent, related cases before this Office in which the procuring activity failed to comply with regulations governing submission of the SF 98 and application of subsequent wage determinations. Minjares Building Maintenance Company, 55 Comp. Gen. 864, 866-67 (1976), 76-1 CPD 168; Dyneteria, Inc., 55 Comp. Gen. 97 (1975), 75-2 CPD 36; aff'd sub nom. Tombs & Sons, Inc., B-178701, November 20, 1975, 75-2 CPD 332.

In our decision, Dyneteria, Inc., supra, at 100, we held that the assumption that all bids submitted in an advertised procurement will be equally affected by the issuance of new wage rates in excess of those contained in the solicitation was inappropriate, and that an award made under that assumption was in contravention of the well-established rule that the contract awarded should be the contract advertised. We concluded that the proper way to determine the effect of such a change in the Government's specifications is to compete the procurement under the new rates. We have subsequently held that the principles set forth in Dyneteria are equally applicable to negotiated procurements. Minjares Building Maintenance Company, supra, at 868; Management Services Incorporated, 55 Comp. Gen. 715 (1976), 76-1 CPD 74.

We believe that these principles have application to what occurred here. The record indicates that EIL's proposal was not based upon the wage rates being paid by the predecessor contractor (BVM) under the latest cba, the rates upon which DOL's subsequent wage determinations (Rev. 4 and 76-762) were based. By letter of July 1, 1976, EIL disputed the Air Force's incorporation, by modification, of Wage Determination No. 72-172

(Rev. 4) in the contract, contending that a "locality" wage determination [see 29 C.F.R. § 4.163 (1975)] containing lower rates was applicable to the contract. Further, our review of the HVM proposal shows that the firm computed its proposal price on the basis of cba rates. It is, therefore, obvious that EIL and HVM were not formulating their proposals on the basis of the same information.

In view of the length of time prior to award that the Air Force knew or should have known that a DOL wage determination was to be issued (March 10 - April 2, 1976) in close proximity to the anticipated award date; the Air Force's significant contribution to the delay in the issuance of the determination; the preaward arrangement for a contract modification, which was issued after the award; and the advice of DOL in the letter of July 30, 1976, we think that the Air Force's actions were tantamount to awarding a contract different from the one solicited in the RFP. As such, the Air Force's reliance on ASPR § 12-1005.3(a) (1975 ed.) is unfounded. The effect of the above circumstances was to prevent the offerors here from competing on an equal basis. Minjares Building Maintenance Company, supra.

Based on the above discussion, we conclude that the award to EIL was improper and, consequently, the protest is sustained.

The base term of the contract and the first option period have expired; we cannot, therefore, recommend corrective action with respect to them. However, the second option under the contract for the term October 1, 1976, through September 30, 1977, has recently been exercised by the Air Force. We recommend that the requirements of the 1-year second option be resolicited in a manner consistent with this decision. After negotiating under a new RFP, the option under which EIL is now performing should be terminated for the convenience of the Government and a new contract entered into with the successful offeror, if other than EIL. If EIL is successful, the existing option should be modified in accordance with its final proposal.

The Secretary of the Air Force is being advised of this recommendation by letter of today.

In view of our recommendation, there remains a further matter for correction in the Air Force's resolicitation. As mentioned above, a portion of the contract was solicited and awarded on a time and materials basis. ASPR § 3-406.1(c) (1975 ed.) prescribes the following mandatory limitation in the use of this type of contract:

> "* * * Because this type of contract does not encourage effective cost control and requires almost constant Government surveillance, it may be used only after determination that no other type of contract will suitably serve. This type of contract shall establish a ceiling price which the contractor exceeds at his own risk. The contracting officer shall document the contract file to show valid reasons for any change in the ceiling and to support the amount of such change." (Emphasis added.)

Although the RFP incorporated by reference into the contract the provisions of ASPR § 7-901.6(c) (1975 ed.) which referred to a ceiling price, no ceiling price was set forth in the contract schedule. Consequently, the time and materials portion of the RFP and the resultant contract were formulated in contravention of the above-cited regulatory restriction.

Parenthetically, we note that the Air Force admits that the RFP should have indicated the impact of the option periods on the method of evaluation pursuant to ASPR § 1-1504(b) (1975 ed.).

The foregoing renders unnecessary any discussion of HVM's additional grounds of protest.

Because our decision contains a recommendation for corrective action, we have furnished a copy to the congressional committees referenced in section 236 of the Legislative Reorganization Act of 1970, 31 U.S.C. § 1176 (1970), which requires the submission of written statements by the agency to the Committees on Government Operations and Appropriations concerning the action taken with respect to our recommendation.

Deputy Comptroller General
of the United States