DOCUMENT RESUME

03874 - [B2773997]

[Allegation of Ambiguity in Solicitation]. B-189458. September 28, 1977. 6 pp.

Decision re: Kleen-Rite Corp.; by Robert F. Keller, Acting Comptroller General.

Issue Area: Federal Procurement of Goods and Services (1900).
Contact: Office of the General Counsel: Procurement Law I.
Budget Function: National Defense: Department of Defense - Procurement & Contracts (058).
Organization Concerned: Department of the Army: Fort Dix, NJ.
Authority: Service Contract Act of 1965 (41 U.S.C. 351 et seq. (Supp. III)). A.S.P.R. 7-1905. 48 Comp. Gen. 757. 48 Comp. Gen. 760. 54 Comp. Gen. 1009. 54 Comp. Gen. 1011. 55 Comp. Gen. 1020. 47 Comp. Gen. 682. 47 Comp. Gen. 685. 53 Comp. Gen. 586. 54 Comp. Gen. 237. 52 Comp. Gen. 285. 4 C.F.R. 20.10. 4 C.F.R. 20.2(b)(1).

The protester claimed that there was an ambiguity in the solicitation and sought clarification. Following bid opening, the protester filed suit to restrain performance under the contract. The solicitation was not ambiguous since it was subject to only one reasonable interpretation. Although the protest of the omission of a mandatory clause from the solicitation was untimely, the issue was addressed since the court expressed an interest in the decision. The award may be made under the defective invitation if the award will meet the Government's actual needs and if no other bidder was prejudiced by the omission. (Author/SC)

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W. Washington Part I

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

FILE: B-189458 DATE: September 28, 1977

MATTER OF: Kleen-Rite Corporation

DIGEST:

1. IFB called for monthly prices for 6-month basic contract period with Government option to renew for 1 year and stipulated two Service Contract Act wage determinations applicable to first 3-month period and at least second 3-month period, respectively. IFB is not ambiguous when it is subject to only one reasonable interpretation, that being bidder could not ignore option period in computing base period price which also was price for option period.

2. Where issue of omission of mandatory clause from IFB is not raised before bid opening it is untimely under GAO Bid Protest Procedures. Issue will be addressed notwithstanding untimeliness, however, since case is in litigation and court has expressed interest in our decision.

3. Where mandatory clause is inadvertently omitted from IFB, rendering it defective, award may still be made under IFB if award will meet Government's actual needs, and no other bidder was prejudiced by omission.

The United States Army (Army), Fort Dix, New Jersey, issued invitation for bids (IFB) No. DABT35-77-B-0051 on June 3, 1977, for custodial services to be provided for the period August 1, 1977, through January 31, 1978, with an option for an additional year.

Prior to the date set for bid opening, the Kleen-Rite Corporation (Kleen-Rite) advised the contracting officer that it believed there was an ambiguity in the IFB and sought clarification. The contracting officer did not agree that there was an ambiguity and advised Kleen-Rite to bid "prudently" on the basis of the information contained in the IFB.

Consequently, by mailgram filed in our Office on June 28, 1977, Kleen-Rite protested any award under this IFB on the ground that an ambiguity existed in the IFB that could result in unbalanced bidding, unfair competition, and unfair advantage to the Government. Kleen-Rite requested that our Office require amendment of the IFB to rectify the alleged ambiguity.

Bids were opened on July 1, 1977, and Kleen-Rite was the third low bidder. The Suburban Industrial Maintenance Company (Suburban) was the low bidder. The Army determined that it should proceed with an award under the solicitation and did so on August 1, 1977, notwithstanding Kleen-Rite's protest. We note here that Kleen-Rite is the incumbent contractor, whose contract has been extended on a monthly basis during the course of the protest at a price substantially in excess of the contract price and its bid for this contract.

Kleen-Rite filed a Complaint for Declaratory Judgment in the United States District Court for the District of New Jersey seeking to restrain performance under the contract. In paragraph 18 of the complaint, Kleen-Rite agreed to be bound by our decision on the protest. On August 29, 1977, the court issued an order denying Kleen-Rite's motion for a temporary restraining order, but ordering the Army to show cause why a preliminary injunction should not be issued pending our decision.

Kleen-Rite's allegation that there was an ambiguity in the IFB is based on its interpretation of the provisions in the IFB relating to the calculation of labor costs for the base period of the contract, and the requirement that the unit price bid for the base period be used for the option period as well. Part I, section C.29 of the IFB advises bidders that the procurement is subject to the requirements of the Service Contract Act of 1965, 41 U.S.C. § 351 et seq. (1970 and Supp. III 1973). This act requires, inter alia, that minimum wage payments under any contract to which the act applies shall be at rates specified by Service Contract Act wage determinations issued by the Department of Labor. Two wage determinations were included in the IFB as required--one currently effective for the first 3 months of the 6-month basic contract period, and a second higher determination to take effect on November 1, 1977, which presumably would cover at least the second 3 months.

Part II, section "E" of the IFB requires the bid price to be based on monthly prices for the entire 6-month basic contract period, rather than having separate monthly prices for the two 3-month periods that correspond to the two wage determinations. Part II, section J.2 of the IFB allows the Government an option to renew the contract. If the option for renewal is exercised, the total duration of the contract cannot exceed 1-1/2 years. Under section J.3, the monthly price bid for the basic contract period would be the price for the option period as well.

Kleen-Rite notes that if a new wage determination is issued that applies to the option period, the contractor will be allowed a contract price adjustment to cover increased costs resulting from the new wage determination, pursuant to Armed Services Procurement Regulation (ASPR) § 7-1905 (1976 ed.). According to Kleen-Rite, the ambiguity arises when a bidder considers the possibility that there may be no new wage determination issued to cover the option period. In such a situation the wage determination applicable to the second 3 months of the basic contract would be applicable to the option period as well, while the contract price for the option period would be that bid for the basic 6-month period, which includes a lower wage determination applicable to the first 3 months. Kleen-Rite states in a letter of September 6, 1977, that:

> "* * * It is, therefore, reasonable for the bidder to assume that when he computes his bid price, he must include in his price an allowance for the additional costs for labor that will be incurred for the extended [option] period under the higher wage determination for the last three (3) months of the base contract price. He cannot assume (and therefore gamble) that a new wage determination will be issued for that period. However, other bidders may not make such an assumption, but will merely average the two wage determinations applicable to the base contract period in order to determine labor costs."

An ambiguity exists only if two or more reasonable interpretations of the IFB requirements are possible (Dittmore-Freimuth Corp. v. United States, 182 Ct. Cl. 507, 390 F.2d 664 (1968); 48 Comp. Gen. 757, 760 (1969)), which in our view is not the case here. We believe the only reasonable construction of the above IFB provisions is that

a bidder is to include in his basic contract price an allowance to cover labor costs if the option is exercised and there is no new wage determination. We do not, however, think that it would be reasonable for a bidder to conclude that it could ignore the option period in computing its price for the basic contract period and merely average prices based on the two wage determinations applicable to the base contract period. Therefore, we find that the IFB was not ambiguous and all bidders competed on an equal footing. While it might have been desirable, as Kleen-Rite suggests, to break out for pricing purposes the two 3-month periods and have the second period price apply to the option period, we do not believe the failure to do so made the IFB defective.

Kleen-Rite also contends that the contracting officer had a duty to clarify the ambiguity when requested to do so prior to bid opening, and did not do so. The contracting officer apparently felt that the IFB was clear, and advised Kleen-Rite to bid "prudently" on the basis of the information contained therein. Since we have found no ambiguity, it is our opinion that the contracting officer's response was appropriate.

The Army, in its response to Kleen-Rite's protest, first noticed that the IFB had mistakenly incorporated by reference ASPR § 7-1905(c), rather than the proper clause ASPR § 7-1905(b). In effect, ASPR § 7-1905 requires that in all contracts subject to the provisions of the Service Contract Act there shall be a clause permitting contract price adjustments when the contractor's costs are increased due to a new wage determination issued after award of the contract. ASPR § 7-1905(c) is the proper clause for single year or shorter contracts, and ASPR § 7-1905(b) is the correct clause for multi-year or option contracts, as the present case involves.

Kleen-Rite, in commenting on the agency's report, requested that we determine "the applicability of ASPR 7-1905(b) to the contract terms and conditions existing."

This issue is untimely raised under our Bid Protest Procedures, specifically 4 C.F.R. § 20.2(b)(1) (1977), which require that protests based upon alleged improprieties in solicitations which are apparent prior to bid opening shall be filed prior to bid opening. Ordinarily, when a court has expressed an interest in our decision, as is the case here, we will consider issues that are untimely raised. Dynalectron Corporation, 54 Comp. Gen. 1009, 1011-12 (1975), 75-1 CPD 341;

Control Data Corporation, 55 Comp. Gen. 1020 (1976), 76-1 CPD 276; and 4 C.F.R. § 20.10 (1976). We observe that the pleadings before the court, upon which the order contemplating our decision was based, do not raise this issue. However, we will provide the court with the benefit of our views.

The Army argues that since the ASPR is a statutory regulation, and ASPR § 7-1905(b) requires the price adjustment clause stated therein to be included in option or multi-year contracts subject to the Service Contract Act, that the clause is incorporated into the contract resulting from the IFB by operation of law. The Army cites G.L. Christian and Associates v. United States, 160 Ct. Cl. 1 (1963) as supporting this proposition. Since the record shows that the Army knew of its mistake prior to award of the contract, however, the issue presented by the inadvertent substitution in the IFB of ASPR § 7-1905(c) for ASPR § 7-1905(b) is whether that rendered the IFB so defective as to require that it be canceled and resolicited with the proper clause.

We have held that the so-called "Christian doctrine" must be limited to the incorporation of mandatory contract provisions into otherwise properly awarded Government contracts, and cannot be used to incorporate mandatory provisions into an IFB when they have been inadvertently omitted. 47 Comp. Gen. 682, 685 (1968). Therefore, the IFB was defective in that it omitted a mandatory clause, and substituted an inappropriate clause.

Our Office has held that the utilization of inadequate, ambiguous or otherwise deficient specifications is not always a compelling reason to cancel an IFB and readvertise. Where an award under the solicitation, as issued, would serve the actual needs of the Government and would not prejudice other bidders, we have not recommended cancellation and resolicitation. GAF Corporation; Minnesota Mining and Manufacturing Company, 53 Comp. Gen. 586 (1974), 74-1 CPD 68; Joy Manufacturing Company, 54 Comp. Gen. 237 (1974), 74-2 CPD 183; 52 Comp. Gen. 285 (1972).

Here, the award of a contract containing ASPR § 7-1905(c), rather than ASPR § 7-1905(b), will serve the actual needs of the Government. The Army has stated that full and free competition was achieved, and that none of the bidders was prejudiced by the

inclusion of the incorrect clause, as none objected to it, apparently bidding as though the proper clause was included. Kleen-Rite was not prejudiced in bidding by the inclusion of the improper clause, as evidenced by its statements throughout the protest that any change in labor costs resulting from a new wage determination applicable to the option period would be covered by the Price Adjustment Clause contained in ASPR § 7-1905. We are aware of no evidence that any other bidder was prejudiced.

Accordingly, the protest is denied.

R. F. Keller

Acting Comptroller General
of the United States