DECISION

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

10,232

FILE: B-192125 DATE: May 21, 1979

MATTER OF: Joule Technical Corporation

DIGEST:

1. Oral protest to agency is permissible if stated in fashion that intent to protest is clear. Intent to protest not evident by statement asserted prior to submission of best and final offer that Service Contract Act wage determination is incompatible with solicitation and will need clarification, and protest, after submission of best and final offer against wage determination per se is untimely.

2. Successful offeror is not guilty of "wage busting" (practice of lowering employee wages and fringe benefits by successor contractor to become low offeror when incumbent contractor's employees are retained to perform same jobs on successor contracts) if incumbent's retained employees are reclassified to lower paying jobs with different duties and responsibilities. However, where no statute, regulation or statement of policy in existence at time solicitation issued precludes "wage busting," no legal impediment exists to prevent lowering of wages for incumbent employees even if reduction can be categorized as "wage busting."

3. While offeror is not legally obligated to pay wages paid by incumbent, where such offeror's proposal expressly states labor rates proposed are based on current wage rates for incumbent personnel, contracting officer should take such statement into account in consideration of proposed costs.

Compensation
Procurement protests
Proposal evaluation
Conflict of interest
Burden responsibility

[Incumbent Contractor ALLEGED AWARD WAS UNLAWFUL]

005359

4. Where cost reimbursement contract is awarded on basis of estimated costs, required cost realism determination of proposed costs which is based for most part on Defense Contract Audit Agency's qualified statements and which does not take into account possible disparity between statements in technical proposal and proposal costs is inadequate.

5. Suggestion that there may have been impropriety in evaluation of proposals because one member of evaluation team was hired by successful offeror shortly after contract award is not substantiated by record, which indicates only that awardee learned of member's retirement plans and made employment offer only after contract award.

6. Where agency advises option for second year's contract performance will not be exercised but initial contract will be extended only for limited period necessary to solicit and award second year's requirements, GAO need not recommend other corrective action since agency's intended action is considered reasonable under circumstances.

DLG01618 Joule Technical Corporation (Joule) protests the DLG01619 award of contract No. N00421-78-C-0051 to Dynalectron, Inc. (Dynalectron), by the Naval Air Station, Patuxent AGC01101 River, Maryland. Joule, the incumbent contractor, contends the award is unlawful because of substantial irregularities in the procurement process including a "nonresponsive" best and final offer by Dynalectron, a defective wage determination incorporated into the request for proposals (RFP), arbitrary evaluations of proposals and a possible conflict of interest by a member of the evaluation team. Allegations

The RFP (No. 421-78-R-0003) called for proposals to provide engineering and technical support services on a cost-plus-fixed-fee basis for one year with an option for one additional year. The RFP stated that in the evaluation of proposals, technical capability would be rated at least twice as important as cost, but cautioned offerors that cost (which would be evaluated on basis of cost realism) should not be ignored as the degree of

its importance would increase with the degree of equality of the technical proposals. The RFP further provided that award would be made to the offeror whose proposal offered the greatest value in terms of technical approach and price. Final cost evaluation took into account base year estimated costs plus those for both the option year and an alternative option year, and on this basis Dynalectron's offer was found to be $103,178 less than Joule's and was the lowest received. The actual difference between the two offers based on the combination of the base year and the alternative option for the second year was $79,474.

Joule's claim of "nonresponsiveness" in the Dynalectron proposal, as well as its assertion of an arbitrary evaluation by the Navy, are grounded upon what Joule perceives as the personnel supervisory requirements of the RFP, the Dynalectron proposal in this respect, and Dynalectron's asserted misclassification of the employees under a Department of Labor (DOL) wage rate determination. In this regard, Joule claims Dynalectron is guilty of "wage busting" in that it hired Joule's employees at lower wage rates than those paid by Joule.

On January 26, 1978, proposals were received from seven companies, including Joule and Dynalectron, both of which were found to be within the competitive range. Additional information and revised proposals were received on April 24, 1978, and evaluations were completed on May 3, 1978. Because the Navy had been advised by DOL that the Service Contract Act of 1965 (SCA), as amended, 41 U.S.C. 351 et seq. (1976), applied, the Navy amended the RFP to include a DOL wage determination and a call for best and final offers by May 25, 1978. After further evaluations, the Navy concluded that the technical proposals of Joule, Dynalectron (scored 92.96 and 92.85 respectively), and five other offerors were essentially equal, and that award should be made on the basis of cost. Award was therefore made to Dynalectron on June 7, 1978, and Joule protested to this Office on June 8, 1978.

The Navy, contending that Joule's objections go to the validity of the wage determination, asserts that the protest is untimely under our Bid Protest Procedures, 4 C.F.R.§ 20.2(b) (1978), because it was not filed prior to closing date for receipt of best and final offers. In this respect, Joule states that when it hand delivered its best and final offer on May 25, 1978, it orally informed the Navy that the wage determination was not compatible with the solicitation and would need clarification.

While an oral protest is permissible under Defense Acquisition Regulation (DAR) § 2-407.8 (1976 ed.), it must be stated in such a fashion that the intent to lodge a protest is clear. Automated Processes Incorporated, B-181262, September 4, 1974, 74-2 CPD 143. In our opinion, an intent to protest is not evident merely by a statement that a wage determination is incompatible with a solicitation and will need clarification. Thus, questions relating to the DOL wage rate determination per se which were apparent from the solicitation are untimely and will not be considered on the merits. However, portions of the protest arise from information available to Joule only after contract award; these portions are timely and will be considered.

The RFP classified various technical personnel required for the contract performance, principally in terms of education and experience. Four technician levels were specified. DOL categories, however, were based on job descriptions and were broken down into three classifications. It was the offeror's responsibility to conform the RFP labor categories to the DOL classifications for the purpose of conforming to the appropriate DOL specified minimum wage rates. A tabulation of the pertinent RFP requirements and the proposal results is as follows:

PROPOSAL SUMMARY

LABOR CATEGORY	ITEM 0001			ITEM 0004		
	L.O.E.[1]	Rate		L.O.E.[1]	Rate	
		Joule	Dynalectron		Joule	Dynalectron
Elect. Tech.						
Level IV[5]	2	$8.00	$7.78(A)	2	$8.40(5%)[3]	$8.17(5%)
III	8	7.78(A)[2]	6.27(B)	10	8.17(5%)	6.52(4%)
II	0	6.27(B)	5.50(C)	5	6.58(5%)	5.50(0%)
1	0	5.50(C)	3.75	3	5.78(5%)	3.75(0%)
Mech.Tech.[4]						
Level IV	0	8.00	7.30	1	8.40(5%)	7.30(0%)
III	2	7.07	6.28	2	7.42(5%)	6.69(5%)
II	0	6.00	4.95	3	6.30(5%)	4.95(0%)
I	0	5.10	3.75	1	5.36(5%)	3.75(0%)

1. Level of effort as specified in RFP in man-years at 2000 hours per man year. Item 0003 same as Item 0001.

2. Upper case letters in parentheses are DOL wage classifications for base year.

3. Percent figures in parentheses are proposed escalation for second year's performance.

4. No DOL wage rates specified for Mechanical Technicians.

5. RFP classification.

The basis for the difference between the two cost proposals is clear from the tabulation -- Dynalectron and Joule did not conform the RFP labor categories to the DOL wage classifications in the same manner. Obviously Joule conformed the RFP electronic technician labor categories to the DOL classifications one step higher than did Dynalectron, and where no wage rate existed Joule proposed rates that were consistently higher than those proposed by Dynalectron. In addition, other variations are apparent. For example, for the most part, where particular classes of labor were required during the initial contract period, Dynalectron proposed a 5 percent wage increase for each employee after one year's service purportedly based on "current projected living costs," but provided no increase for employees not utilized during the initial contract period. Joule projected 5 percent higher wage rates across the board for the second performance year, without regard to first year utilization. Thus, if we consider only items 0001 and 0004, Dynalectron's projections include no wage increase for 26,000 labor hours used in evaluation and are premised on a significantly lower wage rate for the total 112,000 labor hours specified by the RFP as the level of effort for these items. These differences alone well exceed the $79,474 difference in proposed costs between the two lowest offers for these items.

The difference in job classifications utilized by the two firms is in part explained by the administrative duties assigned by Joule to its lead (Level IV) technicians because the DOL wage determination excluded from its coverage those [among others] technicians with administrative or supervisory responsibility.

The wage rate determination also provided that any class of service employee required in the performance of the contract but not listed in the wage determination was to be classified by the contractor so as to provide a reasonable relationship between such class and those listed in the wage determination with employees to be paid as determined by agreement of the contracting agency, the contractor and the employees. In the absence of such agreement, the question of proper rate was to be submitted to DOL for final determination.

Although the Navy states all offerors but Joule classified the required personnel as did Dynalectron, Joule contends that Dynalectron misclassified the personnel because its two former lead technicians with supervisory duties have been hired at lower wages by Dynalectron for the same duties they performed for Joule. Joule contends that this is a violation of fundamental national labor policy and of the service contract procurement policy as reflected in Policy Letter 78-2, entitled "Preventing 'Wage Busting' for Professionals: Procedures for Evaluating Contractor Proposals for Service Contracts," issued by the Office of Federal Procurement Policy (OFPP), Office of Management and Budget, on March 29, 1978. 43 Fed. Reg. 18805 (May 2, 1978).

"Wage busting" is the practice of lowering employee wages and fringe benefits by a successor contractor as a result of the contractor's effort to be a low bidder or offeror on a Government service contract when the employees continue to perform the same jobs on the successor contract. A successor contractor is not guilty of wage busting when employees are reclassified by the successor contractor to lower paying jobs with different duties and responsibilities. REPORT BY THE COMPTROLLER GENERAL OF THE UNITED STATES, SPECIAL PROCUREMENT PROCEDURES HELPED PREVENT WAGE BUSTING UNDER FEDERAL SERVICE CONTRACTS IN THE CAPE CANAVERAL AREA, HRD-78-49, February 28, 1978.

In this respect, Dynalectron contends its classifications were based on the duties reflected by the solicitation and not upon the practices followed by Joule in its performance of the previous contract. Dynalectron states that while Joule's lead technicians may have been performing supervisory duties, the duties of the Electronic Technician, Level IV specified in the solicitation do not include any supervisory duties, and that it was not its intention that they do so. It further states,and the Navy concurs, that it was the offeror's responsibility to conform the personnel proposed to appropriate wage classes in the wage determination and that Dynalectron reasonably did so.

DOL has excluded from the coverage of the SCA "bona fide executive, administrative or professional personnel," 29 C.F.R. 4.113(a)(2) (1978), although the Act does extend to employees such as a "foreman or supervisor in a position having trade, craft or laboring experience as the paramount requirement." 29 C.F.R. 4.113(b). Complex definitions of "bona fide executive, administrative or professional personnel" promulgated by the Secretary of Labor are contained in 29 C.F.R. 541. As we understand it, it is Joule's position that the Level IV technicians required by the solicitation perform administrative functions which would exclude those persons from the coverage of the Act (apparently this was the basis for Joule's determination that the Level IV technicians did not conform to DOL's Class A classification); that by hiring Joule's employees to perform the same duties as performed for Joule, Dynalectron was bound to conform to the DOL determination in the same manner as Joule, and that by failing to do so, Dynalectron was in violation of the SCA and thus guilty of "wage busting." Joule also asserts that the contracting officer could not have adequately determined the cost realism of Dynalectron's proposal without considering the implications of the SCA violations.

In its original form the SCA permitted DOL to find "prevailing wage rates" which were lower than those being paid by an incumbent contractor under a collective bargaining agreement. As a consequence, competitors were often able to propose lower wages than were being paid by an incumbent so long as they were consistent with the DOL wage rate determinations. National Labor Relations Board v. Burns International Security Services, Inc., 406 U.S. 272 (1972). Subsequent amendments to the SCA prohibited successor contractors from paying "less than the wages and fringe benefits * * * provided for in a collective-bargaining agreement as a result of arm's-length negotiations, to which such service employees would have been entitled if they were employed under the predecessor contract * * *." 41 U.S.C. 353(c) (1976). However, no such collective bargaining agreement exists in this case, and hence neither DOL nor Dynalectron was bound by the wages previously paid by Joule to its employees under the predecessor contract.

The Office of Federal Procurement Policy (OFPP) has sought to preclude wage busting for professional employees, a class of people not normally covered by union agreements, by providing for agencies to consider lowered professional employee compensation as indicating a lack of sound management. 43 Fed. Reg. 18805, May 2, 1978. The OFPP procedures are clearly inapplicable to this case, however, because their effective date (April 1, 1978) is subsequent to the December 1977 date the RFP was issued. As a consequence, there is no impediment either in the SCA, in the regulations, or in anything else to prevent a reduction in wages for incumbent employees in this case, even if a reduction can be categorized as "wage busting."

Nonetheless, we do question the efficacy of the contracting officer's cost realism determination. While Dynalectron claimed it had its own employees available for contract performance, it asserted that:

> "[I]t is our intention to utilize, to the maximum extend possible, currently assigned [incumbent] employees. This approach recognizes the performance improvement curve of incumbent personnel, a management tool the government has relied upon for many years to forecast cost. The retention of incumbent personnel will result in maximum performance at the lowest cost.
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> " * * * we have projected the price, wages and pay as realistically as possible. It is Dynalectron's policy to pay * * * wages consistent with the work schedule and the responsibilities assigned to each employee. * * * The labor rates for the contract period are based on the following:
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> -'Current wage rates for incumbent personnel
> -Wage Determination #75-639, Rev. #2
> -Projected Cost Increases * * *.'

> "We assume that the overall cost evaluation will include accurate, current and realistic estimating practices and that this cost realism will be a part of the government's evaluation."

There is no evidence on the record to suggest that, except for the Level IV technicians, the incumbent's employees were to be reclassified to perform different duties for Dynalectron. Indeed, for Dynalectron to have done so would be inconsistent with the premise in its proposal which recognized "the performance improvement curve of incumbent personnel" and that "retention of incumbent personnel will result in maximum performance at lowest total cost." The familiarity of the incumbent's personnel with the work required as well as the impact on costs resulting from their retention presumably were considered in the proposal evaluation process. Thus, while Dynalectron was not legally obligated to pay the wages paid by its predecessor, we believe that in view of the express language of its proposal the contracting officer's consideration of its proposed costs should have taken into account the wages previously paid to these personnel, not merely the minimum wages specified in the DOL wage rate determination and the offeror claimed conformance thereto.

In this respect, we have reviewed the DCAA audit reports of the cost proposals of both Dynalectron and Joule.

When comparing Joule's proposed labor rates for item 0001 (the base year of the contract) to the most current payroll records at the time of the examination, DCAA found no basis for questioning those costs. DCAA also found that the labor rates proposed for Items 0003 and 0004 (the option period) were based on "current labor rates" plus an escalation. DCAA questioned only the extent of the proposed escalation for the option year, not the base rates themselves. Since the DCAA audit of Joule's proposal was based on actual payroll data, and presumably to some extent the prevailing wage rate for similar personnel in the area, particularly with respect to those jobs not required for the base year (where no actual payroll data existed), we think it was incumbent on the contracting officer to verify

through negotiations Dynalectron's proposed labor costs vis-a-vis the statements contained in its proposal. See 47 Comp. Gen. 336 (1967).

There is no evidence to suggest that the contracting officer questioned the potential disparity between actual payroll data and Dynalectron's proposed labor costs or the significant difference in wage rates it proposed where no payroll data existed. For example, Dynalectron proposed wages at $3.75 per hour for Level I Electronic Technicians, who by the terms of the solicitation were required to have a "minimum of one year's general electronic experience and one year specialized experience on radar and/or test equipment or related systems," with education either in technical school or in the military. These wage rates showed no escalation for the option year ostensibly because no such personnel were required during the initial year's contract performance. Yet DCAA verified that Joule has experienced an average of 7.2 percent annual wage increase for personnel on its payroll at the job site, a rate which appears to be in keeping with general inflationary trends currently experienced in the United States. In addition, the DOL determination listed applicable minimum rates for the base year for other personnel such as typists (Class A) at $4.10 per hour, Class B at $3.87 per hour, file clerks, Class A at $4.31 per hour and Class B at $3.97 per hour, all at higher hourly rates than proposed by Dynalectron for Level I technical personnel.

We believe that where, as here, the award of a contract is ultimately based strictly on costs proposed, a determination of cost realism requires more than the acceptance of proposed costs as submitted. DCAA's audits were admittedly limited in scope and were not considered in conjunction with any technical evaluation. More importantly, however, the DCAA audit report did contain a significant caveat, i.e.,:

> "Although the cost and pricing data are not adequate in all respects (see paragraph 2, 'Special Circumstances Affecting the Examination') the proposal may be considered to be acceptable as a basis for negotiation.

> [Translation: There were missing items of support for the costs proposed, but based on the data in hand, there was nothing to indicate the proposed costs were not in line with the data examined. Consider this in negotiation]."

Paragraph 2 referred to above, includes a statement that:

> "Although we reviewed the proposal to the extent possible in the circumstances, we were unable to reach a definitive conclusion on the quantitative and qualitative aspects of the proposal * * *."

Also, the DCAA report stated that:

> "The evaluation disclosed no questioned unsupported or unresolved items which would preclude acceptance of the [Dynalectron] proposal as submitted."

However, in view of the qualifications noted above, we question the extent to which the contracting officer could reasonably rely on the Dynalectron proposal "as submitted", particularly when he was faced with a comparative audit report based on "current labor rates" at substantial variance to those proposed by Dynalectron. Ultimately the contracting officer is responsible for the exercise of the requisite judgments and solely responsible for the pricing decisions. Audit reports are advisory only and at most form the basis for these pricing decisions. DAR 3-801.2(d)(1) (1976 ed.).

The award of cost reimbursement contracts requires the exercise of informed judgments as to whether proposed costs are realistic and it is improper to award such a contract on the basis that such costs are reasonable because they are low per se on a comparative basis if the Government fails to adequately measure the realism of such low costs. See 50 Comp. Gen. 390 (1970). In this respect, the report submitted by the agency indicates to us that the contracting officer did not perform any cost realism analysis in conjunction with

the technical and management proposals, but instead relied solely upon the significantly qualified DCAA audit findings. Also, the record does not show that the contracting officer questioned Dynalectron's application of the DOL wage rate determination in connection with the clearly expressed statements in its proposal that its proposed wage rates were based on current wage rates for incumbent personnel. Neither is there any indication that for those categories of labor where DOL had not issued a wage rate determination, the contracting officer considered the possibility that the wages were unrealistically low (particularly in view of the DCAA finding in its audit of Joule's proposal and the DOL wage rates for clerical type personnel) or that the lack of an inflation escalation factor for those wage rates might reflect on the credibility of the cost proposal. In our view, the contracting officer, when faced with material variances between the competing proposals, should have verified the discrepancies by requesting verification and support for the wage rates proposed by Dynalectron. We do not here suggest that Dynalectron's cost proposal would not ultimately have been found to be realistic, had an analysis been performed. However, in the apparent absence of such an analysis, we must view the contracting officer's cost realism determination as inadequate.

Finally, Joule suggests that there may have been an impropriety in the evaluation of proposals because of its claim that within one week of contract award, one member of the evaluation team was hired by Dynalectron to administer the contract. However, Dynalectron points out it was not until after award that it learned of the retirement plans of the party in question and it was at that time that it made its offer of employment. Thus, because of the time sequence involved, Dynalectron in effect claims the employment offer could not have influenced the evaluation process. We have no reason to question the veracity of Dynalectron's statements in this respect, and Joule has offered no evidence to the contrary.

Although we find the cost analysis to have been inadequate, we need not recommend corrective action since we have been advised by the contracting officer that the Navy will not exercise the option for the second year's performance, but will extend the contract for the limited period necessary to resolicit and award on the basis of expanded requirements. We believe such agency action is reasonable under the circumstances. By separate letter of today, we are pointing out to the Secretary of the Navy our concern with regard to the cost analysis.

The protest is sustained in part and denied in part.

P.F. Kelly

Deputy Comptroller General
of the United States