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Comptroller General
of the United States

United States General Accounting Office
Washington, DC 20548

Decision

Matter of: Northeast Military Sales, Inc.; Fevata's Bakery, Inc.; Tony's Fine Foods; Military and Deli Bakery Services, Inc.; and Special Markets, Inc.

File: B-291384

Date: November 20, 2002

Ira E. Hoffman, Esq., and Brian T. Scher, Esq., Grayson Kubli & Hoffman, for the protesters.
Elliot J. Clark, Jr., Esq., Defense Commissary Agency, for the agency.
Guy R. Pietrovito, Esq., and James A. Spangenberg, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

Protest challenging the application of the Service Contract Act to a procurement for delicatessen and bakery operations at military commissaries is dismissed, where the Department of Labor (DOL) issued a wage determination applicable to the procurement in response to the procuring agency's notice of intent to make a service contract and the protesters did not request that DOL review the wage determination and its applicability to this particular procurement, as provided for in DOL's regulations.

DECISION

Northeast Military Sales, Inc.; Fevata's Bakery, Inc.; Tony's Fine Foods; Military and Deli Bakery Services, Inc.; and Special Markets, Inc. protest the terms of request for proposals (RFP) No. DECA02-02-R-0001, issued by the Defense Commissary Agency (DeCA) for delicatessen and bakery (deli/bakery) operations for commissaries at six military installations in Virginia. The protesters object to the application of the Service Contract Act of 1965 (SCA) to the procurement, contending that to the extent that DeCA or the Department of Labor (DOL) has determined that the principal purpose of this procurement is to furnish services, such a determination is clearly contrary to law.

We dismiss the protest.

The RFP, issued May 23, 2002 under the commercial item provisions of Federal Acquisition Regulation (FAR) Part 12, sought proposals for deli/bakery operations at

commissaries at Oceana Naval Air Station, Little Creek Naval Air Base, Langley Air Force Base, Fort Eustis, Norfolk Naval Operations Base, and Fort Lee. Deli/bakery operations at these locations were previously provided under a contract awarded in 1996 and were subject to an SCA wage determination issued by DOL. Agency Motion for Summary Dismissal (Oct. 4, 2002) at 1.

The RFP at issue here provides for the award of a follow-on contract for deli/bakery operations and incorporated by reference FAR § 52.222-41, "Service Contract Act of 1965, as Amended." This clause provides that the contract is subject to the SCA and that each service employee employed in the performance of the contract must be paid not less than the minimum wages and fringe benefits determined by DOL in an attached wage determination. Included with the RFP was the wage determination for the 1996 deli/bakery operations contract.

On April 2, prior to issuing the RFP, DeCA submitted to the Wage and Hour Division of DOL a Standard Form (SF) 98, "Notice of Intention to Make a Service Contract Act and Reponse to Notice." On May 6, DOL returned the SF-98 to DeCA with a request for additional information. On July 8, DeCA provided additional information to DOL to support the SF-98. Subsequently, DOL visited a military commissary to observe deli/bakery operations. On August 20, DeCA was informally informed that DOL would not be rendering a "final decision on the application of the SCA anytime in the near future." Agency Motion for Summary Dismissal (Oct. 4, 2002), encl. 11, DeCA Internal E-mail. The contracting officer notified potential offerors that:

> the issue of the applicability of the SCA to the deli/bakery operations had not been resolved and [the contracting officer] did not anticipate its resolution in the near future and therefore determined to proceed with the . . . solicitation . . . and award activities to insure contractual coverage for the deli/bakery operations for the six commissaries in the Tidewater area of Virginia.

Agency Motion for Summary Dismissal (Oct. 4, 2002) at 3.

The protesters object to DeCA's determination that the SCA would be applicable to the deli/bakery operations to be provided under the contract. Specifically, the protesters complain that the principal purpose of the deli/bakery contract was "the provision of food, not services." Protest at 11.

Initially, DeCA requested that we summarily dismissal the protest, because DOL had issued a wage determination applicable to the 1996 deli/bakery operations contract and the work under the 1996 contract was the same as would be provided under the RFP. We declined to summarily dismiss the protest because DOL had not issued a wage determination for this procurement, and the record otherwise indicated that DOL had not yet determined the applicability of the SCA to this procurement. See Letter from DOL (Oct. 21, 2002). Also, DeCA informed us that it would not await DOL's determination in this regard.

Subsequently, in response to DeCA's submission of an amended SF-98, DOL issued a new wage determination applicable to this procurement. DeCA renewed its request for dismissal on the basis that DOL, and not our Office, was the proper place for the protester to challenge the application of the wage determination.

The SCA generally applies to any federal contract, "the principal purpose of which is to furnish services." 41 U.S.C. § 351(a); FAR § 22.1003-1. The regulations implementing the SCA contemplate an initial determination by the procuring agency as to whether the SCA is applicable to a particular procurement. If the agency believes that a proposed contract "may be subject to" the SCA, the agency is required to notify DOL of the agency's intent to make a service contract so that DOL can provide the appropriate wage determination. 29 C.F.R. § 4.4 (2001). If there is any question or doubt as to the application of the SCA to a particular procurement, the agency is required to obtain DOL's views. FAR § 22.1003-7.

Because DOL has the primary responsibility for interpreting and administering the SCA, see 41 U.S.C. § 353(a), we have long held that we will not review a procuring agency's determination to follow DOL's views on the applicability of the SCA, unless those views are clearly contrary to law. Ober United Travel Agency, Inc., B-252363, May 7, 1993, 93-1 CPD ¶ 375 at 2; Hewes Eng'g Co., Inc., B-179501, Feb. 28, 1974, 74-1 CPD ¶ 112 at 3. Here, the protesters assert that the application of the SCA to this procurement would be clearly contrary to law.

In a telephone conference with the parties, DOL informed us that it has made no "official" determination of the applicability of the SCA to this procurement. See also Letter from DOL (Oct. 31, 2002). Rather, in response to DeCA's SF-98 notice of intent to make a service contract, DOL issued a wage determination applicable to this procurement. DOL also stated that, in the absence of a contrary ruling by DOL, a procuring agency may rely upon the wage determination in applying the SCA to a particular procurement. See Ober United Travel Agency, Inc., supra, at 2-3.

Under DOL's regulations implementing the SCA:

> Any interested party affected by a wage determination . . . may request review and reconsideration by the Administrator. A request for review and reconsideration may be made by the contracting agency or other interested party, including contractors or prospective contractors and associations of contractors, representatives of employees, and other interested Governmental agencies.

29 C.F.R. § 4.56(a); see also 29 C.F.R. § 4.101(g) (inquiries as to DOL official rulings and interpretations with respect to the application of the SCA should be directed to the Administrator of the Wage and Hour Division). A decision of the Administrator of DOL Wage and Hour Division under section 4.56(a) of DOL's regulations may be appealed to the agency's Administrative Review Board. See 29 C.F.R. § 4.56(b).

The protesters argue that we should not dismiss its challenge to the application of the SCA because the protester has asserted that the application of the Act to this procurement is contrary to law. The protesters argue that our Office has the authority and responsibility under the Competition in Contracting Act of 1984, 31 U.S.C. § 3553 et seq. (2000) to review DOL's judgment as to the applicability of the SCA where DOL's determination is shown to be clearly contrary to law.[1]

The protester has not availed itself of the opportunity set forth in DOL's regulations to obtain DOL's review of the applicability of the SCA to this procurement. As noted above, it is DOL, and not our Office, which has the primary responsibility for interpreting and administering the SCA. Under this authority, DOL has promulgated regulations, which provide a specific mechanism for requesting DOL's review of a wage determination and its applicability to a particular procurement. We think it is inappropriate for our Office to consider a protest challenging the application of the SCA to a particular procurement, where DOL has not been given the opportunity (as provided under 29 C.F.R. § 4.56(a)) to provide its determination governing applicability. See Ober United Travel Agency, Inc., supra, at 3.

The protest is dismissed.

Anthony H. Gamboa
General Counsel

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[1] The protesters also appear to argue, citing to a number of our decisions, that we should review the reasonableness of DeCA's determination that the SCA is applicable to this procurement. The decisions cited by the protesters involve the situation where a procuring agency had determined that the SCA (or the Davis Bacon Act) did not apply to a procurement, without obtaining a wage determination from DOL, or otherwise obtaining DOL's views as to applicability. See, e.g., Resource Recovery Int'l Group, Inc., B-265880, Dec. 19, 1995, 95-2 CPD ¶ 277 at 2. Where a procuring agency does not believe that a proposed contract is subject to the SCA, there is no duty to notify DOL or include the SCA provisions in the solicitation. Tenavision, Inc., B-231453, Aug. 8, 1988, 88-2 CPD ¶ 114 at 2. We will review, however, the reasonableness of a procuring agency's judgment in this regard, including whether DOL's views should have been solicited. Information Handling Servs., B-240011, Oct. 17, 1990, 90-2 CPD ¶ 306 at 4. That is not, however, the case here.